Supreme Court, U.S.
FILED
07-563 OCT 21 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

PETRO-HUNT, L.L.C., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. May the Fifth Circuit, contrary to decisions of this Court, improperly reject findings of undisputed fact of the District Court and engage in fact finding of its own to, not only reverse summary judgment, but render judgment for the United States, an adverse party who had not moved for summary judgment, and deprive plaintiffs of a trial on the merits and thus deprive plaintiffs of due process?

II. Are the Fifth Circuit rulings on *res judicata* and collateral estoppel manifestly erroneous and contrary to many decisions of this Court, and, with respect to collateral estoppel, do they cause a conflict in the circuits, and so far depart from accepted and usual course of judicial proceedings, and sanction such a departure by a lower court, as to call for an exercise of this Court's supervisory power?

III. Does rigid application of the "panel rule," or "law of the circuit" rule by the Fifth Circuit in the same case cause a denial of due process and is such application in conflict with other circuits, and should uniform application of the rule be ordered by this Court?

LIST OF PARTIES

The Petitioners (Plaintiffs/Appellees below) are:

Petro-Hunt, L.L.C.;
Hunt Petroleum Corporation and
Kingfisher Resources, Inc.

The Respondents (Defendants/Appellants below) are:

The United States of America
Other Defendants below are:
Aspect Resources, L.L.C.;
Bayou Petroleum Co.;
Catawba Energy, Inc.;
First Texas Hydrocarbons, Inc.;
Oscar C. Forland;
Gulf Coast Oil & Gas Co.;
Justiss Oil Co.;
MB Exploration, L.L.C.;
Northstar Energy, L.L.C.;
Palmer Petroleum, Inc.;
Howell R. Spear;
John P. Strang;
Wheless T.D.L. Exploration Co., L.L.C.;
Ocean Energy Resources Inc., formerly known as UMC Petroleum Corp.;
Devon S.F.S. Operating, Inc., formerly known as Santa Fe Snyder Corp.;
J. Bradley Jeffreys;
Energy Arrow Exploration, L.L.C., and
Carruthers Producing Company, Inc.

CORPORATE DISCLOSURE STATEMENT

Petro-Hunt, L.L.C. is a Delaware limited liability company and is wholly owned by the William Herbert Hunt Trust Estate, a Texas Trust. Neither Petro-Hunt, nor the parent trust, are publicly traded entities. Both are privately held.

Hunt Petroleum Corporation is incorporated in Delaware. It is a privately held company. Hunt Petroleum Corporation stock is not publicly traded.

Kingfisher Resources, Inc. is incorporated in Delaware. It is a privately held company. Kingfisher Resources, Inc. stock is not publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc., (hereinafter "Petro-Hunt" or "plaintiffs") respectfully request that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on March 6, 2007, issued as the mandate August 14, 2007, and all prior adverse rulings pertaining to such judgment and opinion. Petitions for rehearing and *en banc* rehearing were denied on July 30, 2007.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit was entered on March 6, 2007, and is reprinted at App. A. The order of the United States District Court for the Western District of Louisiana, denying plaintiffs a trial is reprinted at App. B. The Judgment of the United States District Court for the Western District of Louisiana on plaintiffs' alternative motion for summary judgment filed on December 7, 2005 is reprinted as App. C. The prior opinion of the United States Court of Appeals for the Fifth Circuit is reported at 365 F. 3d 385 (5th Cir. 2004) and is reprinted at App. D. The original opinion of the United States District Court for the Western District of Louisiana is reported at 179 F. Supp. 2d 669 (W.D. La. 2001), and is reprinted at App. E. The order of the United States Court of Appeals for the Fifth Circuit denying plaintiffs' Petition for Rehearing filed July 30, 2007 is reprinted at App. F.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review by writ of *certiorari* cases in the courts of appeals "before or after rendition of judgment or decree." 28 U.S.C. § 1254(1).

Petro-Hunt filed its declaratory judgment action seeking to quiet title to certain mineral interests pursuant to 28 U.S.C. § 2409(a), and to recoup costs and fees as provided by 28 U.S.C. § 2412(a)-(c). Jurisdiction was conferred upon the District Court by 28 U.S.C. § 1346(f). Petro-Hunt seeks review of the decision of the United States Court of Appeals for the Fifth Circuit affirming the District Court's ruling denying its motion for trial on the merits, or seeks either a trial on the merits or alternatively, to vacate the decision of the Fifth Circuit and reinstate the original opinion of the District Court. Petro-Hunt timely filed for panel rehearing and a rehearing *en banc*, which were denied by the Fifth Circuit Court of on July 30, 2007. This petition has been filed within ninety days of the denial of petitions for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS PROVIDED

The decision below denies applicants the protection of due process and equal protection pursuant to the Fifth and Fourteenth Amendments to the United States Constitution by denying them a trial on the merits, and based upon the Fifth Circuit's rigid application of

the "panel rule" or "law of the circuit" doctrine. The Fifth and Fourteenth Amendment to the United States Constitution are reprinted at App. G. The due process clause of the Fifth Amendment to the United States Constitution provides that "no person shall be . . . deprived of . . . property without due process of law, nor shall private property be taken for public use, without just compensation."

Petitioners also seek review with respect to whether Louisiana Act 315 of 1940, now found at L.S.A. R.S. 31:149 and reprinted at App. G, can be applied here consistent with *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973) and other authority, based on the specific facts of this case.

STATEMENT OF THE CASE

A. Facts and Background

The District Court entered summary judgment in favor of Petro-Hunt based solely on *res judicata* and collateral estoppel, finding that *United States v. Nebo Oil, Co.*, 190 F.2d 1003 (5th Cir. 1951) was dispositive, and that Petro-Hunt was the owner of the Louisiana mineral property which is the subject of this suit, and that the Louisiana rules of prescription of mineral servitudes would not apply for so long as the United States owned the surface of this land. *Petro-Hunt v. United States*, 179 F.Supp.2d 669 (W.D.La. 2001). The Fifth Circuit, in the first appeal, reversed summary judgment, holding

that *res judicata* only applied to 800 acres of the property, and, without allowing plaintiffs a hearing or a trial, or even argument, *sua sponte*, rendered judgment for the United States, depriving plaintiffs of due process in contravention of *Fountain v. Filson*, 336 U.S. 681 (1940) and other decisions of this Court.

A brief recitation of pertinent facts is helpful in understanding this case. Louisiana law does not usually allow a landowner to permanently sever a mineral estate from the surface estate. *See Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207 (La. 1922).[1] A mineral servitude[2] may be created severing the mineral estate from the surface estate for a period of 10 years. L.S.A. R.S. 31:27. If, during the 10 year period, drilling occurs on the property, the servitude is extended for another 10 years. L.S.A. R.S. 31:29. In the event of production of hydrocarbons, the servitude lasts for the duration of the production, and for 10 years thereafter. L.S.A. R.S. 31:36. This peculiarity in Louisiana law was an impediment to the United States in acquiring property in Louisiana for the National Forest.[3]

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1. There are exceptions. *See* L.S.A. R.S. 31:149-151 (West 2004).

2. A "servitude" is essentially a right of use. *Texaco v. La. Land & Exploration*, 136 B.R. 658 (M.D. La. 1992). Every other state allows the minerals to be permanently severed.

3. Prior to the year 1936 the United States was interested in purchasing lands in Louisiana for National Forest purposes and had found that owners of large tracts of land were unwilling to

(Cont'd)

In *Nebo*, the government selected and litigated title to 800 acres which is part of the 180,000 acres at issue here, and which is part of a 24,943.93 acre conveyance of the surface to the government, and is also part of a 37,532.13 acre mineral conveyance to plaintiff's predecessors in title. The issue in *Nebo* was whether Louisiana Act 315 of 1940 could be constitutionally applied to the facts of that case. Act 315 of 1940 suspended the rules of prescription of mineral estates where the United States became the owner of the surface of the property. *Nebo* held that Act 315 of 1940 was lawful and constitutional, and thus the minerals would not revert to the owner of the surface as long as the United States owned the surface. 90 F. Supp. at 84; 190 F. 2d at 1010. Plaintiffs are the direct successors in interest of Nebo Oil Company. 179 F.Supp.2d at 674. Following

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(Cont'd)

> sell their lands because of court decisions holding that the sale or reservation of mineral rights in Louisiana created only a right in the nature of the servitude which was subject to prescription by 10 years non-user [sic]. *However, the United States Department of Agriculture, Forest Service, was not in accord with this view and on May 29, 1935, submitted to Bodcaw Lumber Company an opinion of the Assistant Solicitor of the Department of Agriculture to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for National Forest purposes.*

Nebo 190 F.2d at 1005 (emphasis added). The *Nebo* court also noted that ownership of the minerals was not necessary to carry out the legislative purpose of the National Forest. 90 F. Supp. at 90.

Nebo, the United States and the plaintiffs, and their predecessors in title, treated the property as though the *Nebo* decision applied to all of the 180,000 acres, until about 1991 when the government began to issue mineral leases on the property. R. Doc 85, Ex. G. After a letter-writing campaign of several years, plaintiffs filed suit pursuant to the Quiet Title Act.

In the present case, the District Court, citing *Nevada v. United States*, 463 U.S. 110 (1983) and *Minnesota Co. v. National Co.*, 70 U.S. 332, 334 (1865), and other authority, found all of the mineral property was "similarly situated" (179 F.Supp.2d at 682) to the 800 acres in the *Nebo* case as well as to the 24,943.93 acre and the 37,532.13 acre conveyances of which the 800 acres was a part, and held that pursuant to the doctrine of *res judicata* or the sister doctrine of collateral estoppel, *Nebo* established title to the minerals for the entire 180,000 acres. The District Court noted that all of the 180,000 mineral acres were conveyed by the same grantors to the same grantees by six identical conveyance instruments, and that subsequent to the conveyance of the minerals, the same grantors conveyed the surface of the property to the United States in nine identical or nearly identical instruments.[4] Nothing was resolved in the original District Court decision other than *res judicata* and collateral estoppel. The government did not file any dispositive motions.

In *Petro-Hunt I*, the Fifth Circuit held that *res judicata* only applied the 800 acres and that an

4. The government acquired a small amount of the property in two expropriation suits.

exception to collateral estoppel based on a change in the law prevented that rule from being applicable, and, *sua sponte*, rendered judgment for the government, without giving Petro-Hunt a chance to even argue the point, much less have a trial. In doing so, the Fifth Circuit erroneously engaged in fact finding of its own, holding that all of the property was "separate" and "distinct" (365 F.3d at 396, 397) rather than "similarly situated" (179 F.Supp.2d at 182) as had the District Court. The Fifth Circuit took this course of action in contravention of a number of decisions of this Court, including *Fountain v. Filson*, *supra*, and deprived plaintiffs of due process, since, based on the Fifth Circuit's mandate, the District Court on remand, refused to give plaintiffs a trial.[5] Plaintiffs appealed again.

The Fifth Circuit affirmed again, denying plaintiffs due process. The Court of Appeals stated, among other things, it could not reverse the first decision in any event, because of the rule that one panel of the Fifth Circuit cannot overrule another, even, as here, in the same case.

If *Nebo* only established title to 800 acres as the Fifth Circuit held (365 F.3d at 396, n. 58) then there has never been a decision by the District Court as to title to the remainder of the 180,000 acres, and whether, under the

5. The Fifth Circuit remanded the case to the District Court with instructions for the District Court to rule on plaintiffs' alternative motion for summary judgment pertaining to the amount of the 180,000 acres that was still owned by plaintiffs due to exploration and production of oil and gas if Act 315 of 1940 could not be aplied.

facts of this case, which are unusual,[6] Act 315 of 1940 is "hostile" to the interest of the United States. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 597 (1973). Petro-Hunt is entitled to a trial to determine title to the bulk of the 180,000 acres, including the correctness and applicability of pertinent case law referred to by the Fifth Circuit in *Petro-Hunt I*, including *Little Lake, supra*; and *Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001), *cert. denied*, 537 U.S. 822 (2002). Petro-Hunt should be allowed, in a trial, to show that because of the unusual facts of this case, Act 315 of 1940 is not "aberrant or hostile" to the government. *See* 412 U.S. at 596.

This Court distinguished the *Nebo* decision on its facts in the *Little Lake* decision. 412 U.S. at 586, n. 4.[7] As the Tenth Circuit noted in the case of *United States v. Hess*, 348 F.3d 1237 (10th Cir. 2003), this Court did not

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6. *See, United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 586, n. 4 (1973).

7. This Court stated:

> The Court of Appeals also emphasized that officials of the Department of Agriculture had represented to the Government's vendor that "the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes." 190 F.2d 1003, 1005. The Court of Appeals noted that the price paid by the Government did not reflect the value of any mineral rights and that the vendor would not have agreed to the land sale absent the Government's representation that Louisiana prescriptive law would not apply. *Id.* at 1006.

instruct the wooden application of *Little Lake* adopted by the Fifth Circuit here.

In holding that the *Nebo* judgment only applied to 800 acres, the Fifth Circuit reached the anomalous conclusion that the 800 acres in *Nebo* were different from the other acres conveyed to the government in the same deed. This directly contradicts the undisputed facts as found by the District Court, that all of the acreage that was conveyed along with the 800 acres in *Nebo* in the same deed, was part of the same *transaction*. 179 F. Supp. 2d at 682. *See, e.g. Nilsen v. City of Moss Point*, 701 F. 2d 556 (1993); Restatement (2d) Judgments § 24 (2007). This Court has, based on a similar procedural setting, held it was improper for the Court of Appeals to render judgment for the adverse party after reversing summary judgment. *Fountain v. Filson, supra.* This is not appropriate review of summary judgment. *See Nat'l Screen Service Corp. v. Poster Exchange*, 305 F.2d 647 (5th Cir. 1962); *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1990) (Court of Appeals cannot be trier of fact). 10A Wright, Miller & Kane, *Federal Practice and Procedure*, § 2716 (2007).

On remand from *Petro-Hunt I*, Petro-Hunt filed a motion requesting a trial. Despite the briefs presented to the District Court regarding the mandate rule and law of the case doctrine, the District Court refused to allow a trial, finding that the mandate of the Fifth Circuit in *Petro-Hunt I* not only reversed summary judgment, but rendered judgment for the United States, despite the fact that the government filed no dispositive motions. *See* Order of the District Court dated November 21, 2005, App. B. Denying Petro-Hunt's motion for a trial deprived

it of due process based on a mandate of the Fifth Circuit, which, if it went as far as the District Court held, would, of necessity, be based on *dicta*, that is, a purported decision on issues not decided by the District Court, and consequently never before the Fifth Circuit.

The Fifth Circuit in *Petro-Hunt II* affirmed the District Court's erroneous interpretation of the mandate and refused to revisit its prior ruling.

B. Proceedings Below

The original decision of the District Court is styled *Petro-Hunt v. United States*, 179 F.Supp.2d 669 (W.D.La. 2001). The District Court originally entered summary judgment in favor of Petro-Hunt based solely on *res judicata* and collateral estoppel, and the government appealed. The first decision of the Fifth Circuit, styled *Petro-Hunt, L.L.C. et al. v. United States, et al.*, 365 F.3d 385 (5th Cir. 2004) ("*Petro-Hunt I*") (originally filed on March 31, 2004; revised on June 1, 2004) reversed and remanded this case to the District Court with instructions to rule upon Petro-Hunt's alternative motion for summary judgment.[8] Plaintiffs applied for a writ of *certiorari*, but this Court denied *certiorari* on December 13, 2004. While the plaintiffs, of course, do not know why *certiorari* was denied, it is significant that the government argued that plaintiffs' writ application was premature, and that the case was interlocutory because of the pending remand.

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8. *See* note 5, *supra*.

On remand, Petro-Hunt moved the District Court to allow it a trial on the issues of whether Act 315 of 1940 was "hostile to the interests of the United States"[9] and whether, based on the facts of this case the government was deprived of its "bargained-for contractual interests."[10] Petro-Hunt also asked to try the effect of representations made by the government to plaintiffs' predecessors in title.[11] 90 F. Supp. 89. The District Court denied the motion. *See* App. B.

Petro-Hunt filed its notice of appeal of the District Court's denial of its motion requesting a trial on December 9, 2005. On March 6, 2007, the United States Fifth Circuit Court of Appeals entered a *per curiam* opinion affirming the District Court's denial of a trial. ("*Petro-Hunt II*"). On April 18, 2007, Petro-Hunt filed petitions for panel rehearing and rehearing *en banc* in the Fifth Circuit, which were denied on July 30, 2007. App. F. On August 3, 2007 Petro-Hunt filed in the Fifth Circuit a motion to stay the mandate pending filing of a writ of *certiorari*, which was denied on August 14, 2007. On August 14, 2007 the mandate issued. App. A. Plaintiffs asked this Court for a Stay which was denied.

Petitioners now file this petition for *certiorari*, and seek to have this Court remedy the conflict in the circuits created by the Fifth Circuit's decisions and to have this

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9. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 597 (1973).

10. *Little Lake* at 597.

11. *See* note 3, *supra*.

Court reverse the Court of Appeals' denial of due process to petitioners.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit, contrary to decisions of this Court, improperly rejected findings of undisputed fact of the District Court and engaged in fact finding of its own to, not only reverse summary judgment, but render judgment for the United States, an adverse party who had not moved for summary judgment, depriving plaintiffs of a trial on the merits and thus depriving plaintiffs of due process.

Reversal of summary judgment by the Court of Appeals does not foreclose a trial, nor is it the equivalent of summary judgment in favor of an opposing party. This Court should grant a writ of *certiorari* to correct the action of the Fifth Circuit in deciding issues of fact, and granting judgment to the opposing party without giving plaintiffs a chance to be heard and present evidence. *Fountain v. Filson*, 336 U.S. 681 (1949). In reviewing entry of summary judgment by a District Court, an appellate court may only "determine whether a genuine issue exists and whether the law was applied correctly." 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2716 (2007). The government appealed the District Court's entry of judgment based upon *res judicata*. The Fifth Circuit, instead of limiting its review to the issue before it, substituted its own findings of fact for those of the District Court, and rendered for the government. This is a violation of due process. *See Boddie v. Connecticut*, 401 U.S. 371(1971) *See also*

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard.) (citations omitted); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 247 (1944).

Petro-Hunt II is easily distinguished from *Harris v. Sentry Title Co.*, 806 F. 2d 1278 (5th Cir. 1987), relied on by the Fifth Circuit for the proposition that no further fact finding by the District Court was required. The quote from *Harris* was taken out of context. The footnote from which the Fifth Circuit quoted in part in *Petro-Hunt II* reads in pertinent part:

> It is common practice for this Court to consider theories other than that relied upon [by] the district court in order to consider whether the judgment of the district court may be affirmed on an alternative ground. Often the Court will ask the parties to submit supplemental briefs to assist the Court in this effort. Here, the Court on the prior appeal addressed an issue which required no further factfinding by the district court and which had been briefed by the parties in trial briefs included in the record. Such action promotes the finality of litigation, consistent with the goal that "the federal system aims at a single judgment and a single appeal." . . . Similarly, this Court often addresses issues for the guidance of the parties and the district court on remand. It cannot be said that such considered statements should be dismissed as dictum simply because the Court was not

> absolutely required to raise and address such an issue. Such statements constitute the "professed deliberate determinations of the [court]" and, when done in this fashion, may not be summarily dismissed as dictum. . . .

Id. at 1280, n. 1 (citations omitted).

In *Harris*, the Court of Appeals did not reject the District Court's findings of undisputed fact as it did here. Here, the Fifth Circuit did not affirm the District Court on an alternative ground. It reversed. In this case, there were no supplemental briefs requested by the Court of Appeals, nor were there any trial briefs in the record. The only issue briefed in the first appeal was *res judicata* and collateral estoppel. Finally, the language in *Harris* that a statement "not absolutely required" is not necessarily *dicta*, probably is just that — *dicta*. *See Kastigar v. United States*, 406 U.S. 441, 454-455 (1972) (Court held that the language relied upon by petitioners "was unnecessary to the Court's decision, and cannot be considered binding authority.")

Petro-Hunt II also relied on *Cont'l Sav. Ass'n v. U.S. Fid. & Guar. Co.*, 752 F.2d 1239, 1244 n.4 (5th Cir. 1985) stating:

> This court, however, has decided issues "on which the lower court has had no occasion to rule," in situations when "the issue before [the court] is a purely legal one." Such rulings are "most efficient to dispose of [an] issue promptly, thus truncating the subsequent development of [a] case." *Id.*

Petro-Hunt II at 7. *Continental Savings* is inapposite. In *Continental Savings*, the Court of appeals found that the District Court had an opportunity to rule on the interpretation of a clause in a contract which was a pure legal issue. Here, there was no such opportunity. *See, e.g. Johnson v. Sawyer*, 120 F.3d 1307,1318 (5th Cir. 1997). In *Johnson*, the Fifth Circuit held:

> Although we can affirm a summary judgment on grounds not relied on by the district court, those grounds must at least have been proposed or asserted in that court by the movant.. More importantly, we have held that, on appeal, we will not consider a new ground in opposition to, or in defense of, summary judgment.

Id. (citations omitted.) Plaintiffs submit that *Johnson* is correct, but it is clearly at odds with *Harris* and *Continental Savings.*

Petro-Hunt I held that the judgment in *United States v. Nebo Oil*, 90 F. Supp. 73 (W.D. LA 1950), *aff'd* 190 F.2d 1003 (5th Cir. 1951) only applied to 800 acres despite the fact that this acreage was contained within a larger conveyance. This directly contradicts the undisputed facts found by the District Court that all of the acreage that was conveyed with the *Nebo* 800 acres in the same deed was part of the same transaction. *See* 179 F.Supp.2d at 682. However, if *res judicata* does not pertain to the rest of the property, then plaintiffs have not had an opportunity to be heard on the issue of whether, under these facts, Act 315 is hostile to the interests of the United States as found on different facts

in *United States v. Little Lake Misere Land* Co., 412 U.S. 580 (1973.) Plaintiffs never had the chance to challenge the applicability of *Little Lake*. Either the original judgment of the District Court should be reinstated or plaintiffs are entitled to a trial.

The District Court explicitly held that the material facts in support summary judgment were not in dispute. 179 F. Supp.2d at 675. It is incongruous for a Court of Appeals to reject a finding of undisputed facts in an effort to render judgment for the adverse party. This is not appropriate review of entry of summary judgment. 10A Wright, Miller and Kane, *Federal Practice and Procedure*, § 2716 (2007).

The Fifth Circuit's action cannot be reconciled with precedent of this Court. Time and again this Court has held that the Courts of Appeals may not grant summary judgment on grounds that have not been addressed by the trial court. *See, e.g., Fountain v. Filson*, 336 U.S. 681 (1949); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963). *See also Pullman Standard v. Swint*, 456 U.S. 273, 291-292 (1982) ("[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court."); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958) (Court of Appeals erred when it reversed the District Court judgment in favor of the plaintiff and directed that judgment be entered for the defendant when the plaintiff did not have an opportunity to present his case); *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801(1949);

Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947).

Had the facts "found" by the Fifth Circuit been alleged in the District Court the plaintiffs would have certainly disputed them. It was unfair for the Court of Appeals to prevent the plaintiffs from briefing the issues that the it ruled upon, *sua sponte*, particularly since this case has facts that were not present in *Little Lake, supra* or *Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001), *cert. denied* 537 U.S. 822 (2002). In this case plaintiffs' predecessors in title were promised by the government that if the surface of the land was sold to the government, the rules of prescription of mineral servitudes would not apply as a matter of federal law. *Nebo*, 90 F. Supp at 79, 82. Further, there was a specific finding by the *Nebo* Court that the government did not intend to buy, and did not pay for the minerals in the 1930's transactions. *Nebo*, 90 F. Supp. 86-90. These are unique facts that are not present in *Little Lake* or *Central Pines*.

In *Fountain*, the District Court granted summary judgment for the defendants. The Court of Appeals reversed the summary judgment and remanded with instructions to enter a personal judgment for the plaintiffs. This Court found that: "The sole basis of the motion was the claim that [state] law would not permit the imposition of the resulting trust under the circumstances disclosed in the complaints and the accompanying documents." *Id.* at 682. This Court held that the Court of Appeals had erred in finding for the plaintiffs since the District Court had not considered the

claim, and because the plaintiffs had not filed for summary judgment. This Court held:

> There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.

Fountain at 682-683, *citing Globe Liquor Co. v. San Roman*, 332 U.S 571 (1948) and *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947).

In *Florida Lime & Avocado Growers, supra*, this Court rejected the argument that, upon reversing a judgment in favor of the appellees, the Court of Appeals could proceed to grant judgment for the appellants on an alternative legal ground that had not been addressed by the District Court. Instead, this Court held that the appropriate course of action was to remand for consideration of the remaining claim rather than "to deny the appellees their day in court as to a disputed part of the case on which the trial court has never ruled because its view of the law evidently made such a ruling unnecessary." *Id.* at 156. *accord, Weade; Cone, both supra.*

Denial of a meaningful opportunity to be heard is a denial of due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard.) (citations omitted); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 247 (1944). In *Boddie v. Connecticut*, 401 U.S. 371(1971), the plaintiffs brought a law suit challenging state procedures for the commencement of litigation that restricted the plaintiffs' access to the courts in their effort to bring an action for divorce. This Court held:

> [D]ue process requires, at a minimum . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "(w)herever one is assailed in his person or his property, there he may defend,"

Id. at 377, *citing Windsor v. McVeigh*, 93 U.S. 274, 277(1876); *Baldwin v. Hale*, 1 Wall. 223 (1864); *Hovey v. Elliott*, 167 U.S. 409 (1897). *See also United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring). In other words, *Boddie* held that the Constitution requires "an opportunity . . . granted at a meaningful time and in a meaningful manner, for [a] hearing appropriate to the nature of the case." *Id.* at 378, citing *Armstrong v. Manzo*, 380 U.S. 545, 552(1965) and *Mullane, supra*, at 313.

The irregular procedure employed by the Fifth Circuit clearly fails to meet the most basic standard of due process because it is so obviously unjust. Plaintiffs should be given the opportunity to be heard in a trial if *res judicata* does not apply. *See Mullane, supra*, at 314. In the first appeal, the plaintiffs only argued that *res judicata* and collateral estoppel should apply. Nothing else was briefed. There was no reason to brief any other issues.

Since the *Little Lake* case was decided by this Court, other courts have distinguished that case on different facts. Plaintiffs have, however, been deprived of the right to distinguish the facts of this case from that of *Little Lake*, even though no court has held that Act 315 of 1940 to be abjectly unconstitutional or always hostile to the government, and even though this Court clearly did distinguish these facts from those of *Little Lake*. 412 U.S. at 586, n. 4. The Fifth Circuit's refusal to grant the plaintiffs an opportunity to prove that, under the facts of this case, the state law is not aberrant and hostile to the government, is incompatible with the rulings of the other circuits. *See, e.g. United States v. Hess*, 348 F. 3d 1237 (10th Cir. 2003); *Nat'l Audubon Soc. v. Department of Water*, 869 F.2d 1196, 1204 (9th Cir. 1988); *Cortese v. United States*, 782 F.2d 845, 849 (9th Cir. 1986). It is also incompatible with declarations from this Court. *See also Wallis v. Pan American Petroleum*, 384 U.S. 63, 68 (1966) ("[A] significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.) (emphasis added); *O'Melviny & Myers v. FDIC*, 512 U.S. 79 (1994).

The District Court in its original decision held that all of the property at issue was "similarly situated." 179 F.Supp. 2d at 682. The *Petro-Hunt I* panel rejected this finding, and then engaged in its own fact finding; improper because it is inappropriate in an appellate review of a summary judgment to make such findings. *See* 10A Wright, Miller and Kane, *Federal Practice and Procedure* § 2716, and cases cited at note 15 (2007). The Fifth Circuit held that all the property was "separate." 365 F.3d at 397. This improper fact finding was essential to the panel's decision which, in effect, rendered judgment for the government. *See, e.g., Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 857-58 (1982) ("An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction . . .'") (citations omitted.)

By ruling that a change in law prevents the effect of collateral estoppel, and that *res judicata* only governs 800 acres, the Fifth Circuit re-opened the fact questions that *Nebo* resolved: What representations did the government make to the property owners in these transactions about prescription? What is the effect of those representations? Did the government intend to buy the minerals? Those and other questions about the title to the rest of the property have to be determined by trial on the merits as to title to the bulk of the 180,000 acres at issue, less the *Nebo* 800 acres.

II. The Fifth Circuit rulings on *res judicata* and collateral estoppel are manifestly erroneous and contrary to many decisions of this Court, and, with respect to collateral estoppel, cause a conflict in the circuits.

Res Judicata

The Fifth Circuit has departed from a number of decisions of this Court pertaining to litigation over similarly situated property. Prior precedent of this Court holds that the *Nebo* decision should control title to all of the property here. When the remainder of similarly situated property is sought to be litigated, the result of the first case should control the second case if the parties are the same. *Nevada v. United States*, 463 U.S. 110, 129 n. 10 (1983); *Arizona v. California*, 460 U.S. 605, 620 (1983); *Heiser v. Woodruff*, 327 U.S. 726 (1946); *Grubb v. Pub. Utils. Comm'n of Ohio*, 281 U.S. 470 (1930); *S. Pac. R.R. Co. v. United States*, 168 U.S. 1 (1897); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); *Minnesota Co. v. National Co.*, 70 U.S. 332, 334 (1865). *See also Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). This Court needs to grant a writ of *certiorari* to correct this aberrant decision of the Fifth Circuit.

The *Nebo* 800 acres is part of a 37,532.13 acre conveyance of minerals and is also part of the 24,943.93 acre conveyance to the government. *Nebo*, 190 F.2d at 1005; *Petro-Hunt I* holds that a prior adjudication between the same parties as to the legal effect of the same transaction involving a part of the same tract of land is not *res judicata* as to the legal rights in another part of that same tract contained in the same conveyance

from the same grantors to the same grantee. In other words the *Petro-Hunt I* opinion holds that the 800 acres at issue in *Nebo* was somehow different from the rest of 24,943.93 acres of which it was a part. Not only is this illogical, but it ignores the rule that *res judicata* applies, not only to matters actually litigated, but also as to all matters which could have been litigated. *Brown v. Felsen*, 442 U.S. 127 (1979).

As stated by this Court in *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996), "[A] prior judgment is generally '*res judicata* not only as to all matters litigated and decided by it, but as to all relevant issues which could have been and were not raised and litigated in the suit.'" *Quoting*, *Heiser v. Woodruff*, 327 U.S. 726, 735 (1946); *see also Grubb v. Public Utils. Comm'n of Ohio*, 281 U.S. 470 (1930).

In *Nevada*, this Court did not allow the United States to re-litigate issues resolved in a court approved settlement involving rights to water from the Truckee River. In explaining the rules of *res judicata* the Court stated:

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

463 U.S. at 129. (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877). Further, this Court stated in a footnote:

> "The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water. [citations omitted] . . .
>
> "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . . [W]here courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change."

463 U.S. at 129, n. 10[12]. Similarly, the government should be barred from relitgating title to the minerals here.

Collateral Estoppel

The ruling in *Petro-Hunt I* does not conform to the dictates of this Court set forth as early as 1897 in *S. Pac.*

12. Quoting *Minnesota Co. v. National Co.*, 70 U.S. 332, 334 (1865).

R.R. Co. v. United States, supra. In *Southern Pacific*, the government sued to quiet title to land along a railroad right of way. In prior decisions, this Court found that certain maps determined title to land depicted on those maps, and ultimately the maps determined the title to land along the railroad right-of-way. This Court stated:

> The general principal announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in the subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

168 U.S. at 48-49.

The United States here seeks to do what the railroad was not allowed to do in *Southern Pacific*. The United States "is not free to select a particular 800 acres, litigate over that, lose, and then re-litigate other parcels of land which are similarly situated."[13]

In *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984), this Court expressed doubt about the purpose of the "change in the law" exception to collateral estoppel

13. 179 F. Supp.2d at 681.

where the issues in both cases arise from virtually identical facts. The *Stauffer* court held:

> [T]he purpose underlying the exception for "unmixed questions of law" in successive actions on unrelated claims is far from clear. But whatever its purpose or extent, we think that there is no reason to apply it here to allow the government to litigate twice with the same party an issue arising in both cases from virtually identical facts. Indeed we think that applying an exception to the doctrine of mutual defensive estoppel in this case would substantially frustrate the doctrine's purpose of protecting litigants from burdensome relitigation and of promoting judicial economy.

Id. at 172, citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). This Court has not explored the issue of collateral estoppel in any depth since *Stauffer*.

The Fifth Circuit applied the "change in law" exception to collateral estoppel even though the parties are the same and the facts have not changed. *Petro-Hunt I* at 397. The decision of the *Petro-Hunt I* panel truncated the issue preclusion rule to nothing more than *stare decisis*. This position cannot be reconciled with this Court's statements in *Stauffer*, 464 U.S. 165, 171 (1984), and Restatement (Second) of Judgments, § 28, Comment (b) (1982).

Petro-Hunt I also creates a conflict among the circuits. *See O'Leary v. Liberty Mut. Ins. Co.*, 923 F.2d 1062, 1067 (3rd Cir. 1991). In *O'Leary*, the plaintiff was

injured in an automobile accident while driving a company vehicle in the scope of his employment. The prevailing state law allowed him only to recover worker's compensation benefits and not the right to pursue the employer's uninsured motorist coverage. Subsequently, the state law was changed allowing injured workers to pursue uninsured motorist claims. O'Leary filed another suit seeking to invoke the new statute. The court held that this change in the law could not benefit O'Leary since the second case involved the same subject matter. In declining to apply the exception which the Fifth Circuit has now recognized, the Third Circuit noted that such a broad exception to collateral estoppel would "swallow . . . the rule." 923 F.2d at 1062. *See also Burlington N. RR v. Hyundai Merchant Marine*, 63 F. 3d 1227, 1237 (3rd Cir. 1995); *Steen v. John Hancock Mut. Ins. Co.*, 106 F.3d 904 (9th Cir. 1997); *Beverly Health and Rehabilitation Services v. Nat'l Labor Relations Bd.*, 317 F. 3d 316, 323, N.2 (D.C. 2003) ("[W]here the legal issue is identical and the factual settings so closely related, the exception simply doesn't apply."); *Precision Air Parts v. AVCO Corp*, 736 F.2d 1499, 1503 (11th Cir. 1984) ("The general rule in this circuit, and throughout the nation, is that changes in the law after a final judgment do not prevent the application of res judicata [sic] and collateral estoppel . . ."); *N. Ga Elec. Membership Corp. v. City of Calhoun*, 989 F. 2d 429, 435 (11th Cir. 1993); *Disabled American Veterans v. C.I.R.*, 942 F.2d 309, 316 (6th Cir. 1991)[14] ("Although adoption of new statutory provisions or new administrative regulations that clearly change the basic legal rules may

14. *citing* 18C Wright, Miller & Cooper, *Federal Practice and Procedure* § 4425 (1981).

allow a party to escape the bar of collateral estoppel, 'the exception is not available merely because the defeated party wishes to reargue the law.'") The Fifth Circuit has adopted the same rule that the Third Circuit rejected in *O'Leary*.

The Fifth Circuit ruling opens the door for the government and other litigants to relitigate decided cases every time the law changes. If this ruling is allowed to stand, there will be no consistency regarding the law of *res judicata* and collateral estoppel throughout the circuits.

III. The Fifth Circuit's rigid application of the panel rule in the same case has created a conflict among the circuits and is incompatible with rulings of this Court.

In *Petro-Hunt II*, the Fifth Circuit applied the so-called "panel rule" in the *same* case and refused to review its prior decision. In this case, the *Petro-Hunt II* panel discussed the law of the case doctrine and its exceptions, but it is apparent the Court declined to review its prior decision based on the panel rule.[15]

In the Fifth Circuit, the panel rule or law of the circuit doctrine is rigidly applied, with the cases holding that once a panel of the Fifth Circuit has decided a legal

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15. If the second panel is without power to review the first in the same case, then it would seem the *Petro-Hunt II* panel's discussion about law of the case was simply *dicta*. As will be discussed below, the Fifth Circuit's cases on this issue are, at best, confusing.

issue, that issue becomes the law of the circuit, and subsequent panels of the Fifth Circuit are without the power to overrule the prior panel, apparently, even in the same case. *See, e.g., McClain v. Seabord Coast Line R.R.*, 490 F.2d 864, 864 n. 3. ("We, just as was the district court, are bound by the prior decision.") In the Fifth Circuit, "the law of the case doctrine is supplanted by [its] firm rule that one panel cannot disregard the precedent set by another panel even though it perceives error in the precedent." *Harris v. Sentry Title Co.*, 806 F. 2d 1278, 1282 (5th Cir. 1987.)

The Fifth Circuit's rigid approach to the so-called "panel rule" has drawn criticism from Wright & Miller:

> [T]here is something troubling about the law-of-the-circuit approach. The rule that a panel decision can be overruled only by the court en banc reflects the perceived self-disciplinary needs of multimember courts of appeals. As compared to a panel hearing an unrelated case, successive panels acting in the same case are working with the advocacy and the facts that inspired the first ruling. If further consideration of the very same dispute demonstrates the error of the initial disposition-and clear demonstration will be demanded-justice between the parties weighs strongly in favor of reconsideration.

18B Wright, Miller & Cooper, *Federal Practice and Procedure* § 4478.2 (2007).

The Fifth Circuit acknowledges that:

> The federal doctrine of the law of the case is that when an appellate court establishes a rule of law in a particular case, it will not depart therefrom on a successive appeal unless sound reasons exist to do so. . . . In this circuit, however, *the law-of-the-case doctrine is supplanted by our firm rule* that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent.

United States v. 162.20 Acres of Land, 733 F. 2d 377, 379 (5th Cir. 1984) (emphasis added), *citing* 1B J. Moore, *Federal Practice*, at 573-74 (2d ed. 1974); *Ruiz v. Estelle*, 666 F.2d 854, 857 n. 5 (5th Cir. 1982) ("[T]he firm rule of this circuit [is] that we cannot disregard the precedent set by a prior panel, even though we perceive error in the precedent.") This presents a clear departure from the other circuits. This Court should grant *certiorari* to resolve this conflict and make the application of the rules uniform among the circuits. This Court's supervisory power over courts of appeals "allows the Court to intervene to protect the integrity of the federal system." *Frazier v. Heebe*, 482 U.S. 641, 648 (1987)

The Ninth Circuit takes a fairer, and less draconian, approach. *See, e.g. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 F. 3d 764, 786 ("Even were the district court bound absolutely by the holding in [the prior appeal], we would still have discretion . . . to decline to follow the law of that case.")

In *Tahoe*, the owners of land surrounding Lake Tahoe sued the regional planning agency, claiming that the agency's temporary moratorium on development effected an unconstitutional regulatory taking of their property. The District Court found that the moratorium constituted a taking, and the agency appealed. In a prior appeal (*TSPC III*), a previous panel had held that the defendants had waived the right to raise a statute of limitations defense. On this appeal, the Court of Appeals held that the prior panel's determination that the defendants had waived a statute-of-limitations defense was "clearly erroneous. The Court held:

> . . . [R]egardless of the district court's authority to decline to follow the law of the case established by this court in *TSPC III*, we have the discretion to do so and we exercise that discretion here. The law of the case doctrine provides that a panel of this court has discretion to depart from the law of the case established by the same panel, or another, where: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, . . ." The holding in *TSPC III* falls squarely into the first category: the decision was "clearly erroneous and its enforcement would work a manifest injustice."

Id. at 787 *citing Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (*en banc.*) *See also Mendenhall v. NTSB*, 213 F. 3d 464, 469 n. 3 (9th Cir. 2000)

In *Mendenhall*, the Ninth Circuit revisited an award of attorney's fees to a commercial pilot, who petitioned

the Court of Appeals for review of an order of the National Transportation Safety Board, finding that:

> We . . . conclude that, for want of proper briefing . . . , we erred in *Mendenhall I* . . .
>
> . . . [A] court may depart from the law of the case when (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result.

Id. at 469 *citing Arizona v. California*, 460 U.S. 605, 618 (1983); *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997); United *States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984). Here, *Petro-Hunt II*'s rigid application of the panel rule has resulted in a ruling that is erroneous and unjust.

In addition to the split in the circuits, there is an internal conflict within the Fifth Circuit that this Court should resolve because such a discrepancy results in the panel rule not being applied equally in all cases. *Compare Perillo v. Johnson*, 205 F.3d 775, 780-81 (2000) ("[T]he law of the case doctrine is a matter of judicial discretion rather than judicial power . . ."); *and White v. Murtha*, 377 F.2d 428, 431-432 (court held that "the 'law of the case doctrine is not an inexorable command . . ." and then listed the reasons for not applying the law of the case

including when "the decision was clearly erroneous and would work a manifest injustice.") *with Harris v. Sentry Title Co.* and *Ruiz v. Estelle, both supra.*

Finally, the panel rule should not apply in this case. The District Court order denying plaintiffs a trial was based on *dicta* from *Petro-Hunt I*, stating that "the 95 servitudes that were not at issue in *Nebo* are subject to the contractual provisions permitting prescription after ten years' nonuse." *Petro-Hunt I*, 365 F.3d at 399. This issue was never resolved by the District Court. *See, e.g. Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 511(1999); *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972); *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351, n. 12 (2005.) The Fifth Circuit's "holding" is thus, *dicta.* The law of the case only applies to issues that have *actually been decided. See, e.g. United States v. Hatter*, 532 U.S. 557 (2001). ("The law of the case doctrine presumes a hearing on the merits.") In any event, the law of the case is not a mandatory doctrine that must be applied in all instances. *See Arizona v. California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power."). Also, to the extent that a prior decision is clearly erroneous, the law of the case doctrine does not obtain. *See, e.g. Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988); *Messinger v. Anderson*, 225 U.S. 436 (1912). Plaintiffs urge this Court to direct the Courts of Appeals to follow the law of the case approach rather than a rigid "panel rule."

Neither law of the case nor the panel rule, which in the Fifth circuit has apparently supplanted the law of the case doctrine, should apply to deny the plaintiffs their

right to present the arguments which the Court of Appeals foreclosed in *Petro-Hunt II*.

CONCLUSION

For the reasons stated above, this Court should grant this Petition to protect the plaintiffs right to due process, and because the Fifth Circuit failed to follow significant precedent of the this Court. In addition, this Court should resolve the split that this case has created among the circuits regarding collateral estoppel. The application of the panel rule should be uniform among the circuits.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 6, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-30095

PETRO-HUNT, L.L.C.; HUNT PETROLEUM CORPORATION; and KINGFISHER RESOURCES, INC.,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, ASPECT RESOURCES, L.L.C.; BAYOU PETROLEUM CO.; FIRST TEXAS HYDROCARBONS, INC.; OSCAR C. FORLAND; GULF COAST OIL & GAS CO.; JUSTISS OIL CO. INC.; MB EXPLORATION, L.L.C; NORTHSTAR ENERGY, L.L.C.; PALMER PETROLEUM, INC.; HOWELL R. SPEAR; JOHN P. STRANG; OCEAN ENERGY RESOURCES INC., formerly known as UMC Petroleum Corp.; WHELESS T.D.L. EXPLORATION CO., L.L.C.; DEVON S.F.S. OPERATING INC., formerly known as Santa Fe Snyder Corp.; J. BRADLEY JEFFREYS; ENERGY ARROW EXPLORATION L.L.C.,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court for the Western District of Louisiana

Before SMITH, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:*

Plaintiffs Petro-Hunt, L.L.C.; Hunt Petroleum Corp.; and Kingfisher Resources, Inc. (collectively, "Petro-Hunt") brought this suit in order to quiet title to 95 Louisiana mineral servitudes claimed by the United States. The servitudes are related to 180,000 acres of surface land acquired by the United States in the late 1930s for incorporation into the Kisatchie National Forest. The case now comes before us on its second appeal. *See Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385 (5th Cir. 2004). Our prior opinion lays out the extensive factual and procedural history behind the case. On this appeal, Petro-Hunt argues that the district court erred on remand by denying a motion for trial; failing that, Petro-Hunt argues that the court's prior mandate is clearly erroneous and should be withdrawn. For the reasons below, we AFFIRM.

The central issue behind the suit is whether Louisiana Act 315, which passed subsequent to the acquisition at issue in this case, operates retroactively to render the mineral servitudes imprescriptible, such

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

that they may never revert to the United States through non-use. The lands to which these servitudes relate were acquired by the United States at the same time as the 800 acres of land and the single mineral servitude at issue in our earlier decision in *United States v. Nebo Oil*, 190 F.2d 1003 (5th Cir. 1951). For present purposes, it is enough to note that the earlier Petro-Hunt appeal determined that the *Nebo Oil* decision did not quiet title to anything beyond the 800 acres of land and the single mineral servitude at issue in that case and that therefore *Nebo Oil* did not, through either res judicata or collateral estoppel, bar the present suit. *See Petro-Hunt*, 365 F.3d at 396-97.

Having reached that determination, the panel then looked to the Supreme Court's decision in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), and this court's subsequent decision in *Central Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001). Following that precedent, the first *Petro-Hunt* panel determined that federal law governed the choice-of-law decision presented by the facts of this case and that Act 315 could not be used as the federal rule of decision because it is hostile to the federal interest at stake. *Petro-Hunt*, 365 F.3d at 399. Accordingly, the panel found that "the 95 servitudes that were not at issue in *Nebo Oil* are subject to the contractual provisions permitting prescription after ten years' nonuse" and remanded the case "so that the district court can determine which servitudes have in fact prescribed." *Id.*

Appendix A

On remand, Petro-Hunt filed a motion for trial on the question of whether Act 315 was "hostile to the government" and therefore could not be applied to the facts of this case-in other words, whether the 95 servitudes in this case are subject to the rule of prescription. The district court denied the motion for trial, citing the mandate in the first appeal for the proposition that the "only issue to be determined is which of the '95 servitudes that were not at issue in *Nebo Oil*' have in fact prescribed for nonuse." The parties then stipulated that five of the servitudes-constituting approximately 109,844.5 acres-still exist through use and that the remainder had prescribed. The district court entered final judgment based on this stipulation, granting Petro-Hunt's earlier alternative motion for summary judgment. The judgment declared the five extant servitudes to be in "full force and effect" and declared any leases on lands burdened by those servitudes to be "null and void." On appeal, Petro-Hunt argues that the district court overstepped its bounds by denying the motion for trial; failing that, Petro-Hunt argues that the court's prior mandate is clearly erroneous and should be withdrawn. We find no merit in either assertion.

Petro-Hunt's first argument is that the prior panel's statement regarding the applicability of *Little Lake Misere* and *Central Pines* to the present case constituted dicta, since only the questions of res judicata and collateral estoppel were raised before either the district court or the circuit panel during the first appeal. This court, however, has decided issues "on which the lower

court has had no occasion to rule," in situations when "the issue before [the court] is a purely legal one." *Cont'l Sav. Ass'n v. U.S. Fid. & Guar. Co.*, 752 F.2d 1239, 1244 n. 4 (5th Cir. 1985). Such rulings are "most efficient to dispose of [an] issue promptly, thus truncating the subsequent development of [a] case." *Id.* Where deciding the issue "require [s] no further factfinding by the district court and ... ha[s] been briefed by the parties in trial briefs included in the record," such action by the court "promotes the finality of litigation, consistent with the goal that "the federal system aims at a single judgment and a single appeal." *Harris v. Sentry Title Co.*, 806 F.2d 1278, 1280 n. 1 (5th Cir.1987) (per curiam) (citing 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[10] (1984)).

> [T]his Court often addresses issues for the guidance of the parties and the district court on remand. It cannot be said that such considered statements should be dismissed as dictum simply because the Court was not absolutely required to raise and address such an issue. Such statements constitute the "professed deliberate determinations of the [court]" and, when done in this fashion, may not be summarily dismissed as dictum. *See* Black's Law Dictionary 409 (5th ed.1979).

Harris, 806 F.2d at 1280 n. 1.

We find that the earlier panel offered just such a deliberate, considered statement in ruling on the choice-

of-law issue. The district court could not, therefore, have properly disregarded the panel's explicit directions regarding the scope of the remand and acted properly in limiting its review in accordance with those instructions. *See Briggs v. Penn. R.R. Co.*, 334 U.S. 304 (1948); *Harris*, 806 F.2d at 1280 n. 1.

With regard to Petro-Hunt's second argument-that the prior mandate of this court is clearly erroneous and should be withdrawn-we begin by noting the well-established rule that one panel within this circuit may not overrule the opinion of another. *Ryals v. Estelle*, 661 F.2d 904 (5th Cir. 1981); *United States v. Henry*, 727 F.2d 1373 (5th Cir. 1984). Furthermore, the law-of-the-case doctrine forbids us from re-examining issues of law or fact decided in a prior appeal. *See United States v. Becerra*, 155 F.3d 740, 752 (5th Cir. 1998). There are three exceptions to this doctrine: we may re-examine an earlier decision only when (1) substantially different evidence is presented; (2) there is a change in controlling legal authority; or (3) "the decision was clearly erroneous and would work a manifest injustice." *Id.; see also White v. Murtha*, 377 F.2d 428 (5th Cir. 1967). "Mere doubts or disagreement about the wisdom of a prior disagreement . . . will not suffice." *Hopwood v. State of Texas*, 236 F.3d 256, 272 (5th Cir. 2000). Petro-Hunt relies on the third of these narrow exceptions, but in support only reasserts the arguments raised before this court during the first appeal. We are not persuaded that the prior panel decision results in such manifest injustice as to warrant the exception, and we therefore decline to apply the exception and revisit the earlier decision.

Appendix A

The district court properly limited the scope of its remand in accordance with the earlier panel instructions, and Petro-Hunt has not shown that the earlier decision on appeal is so clearly erroneous as to work a manifest injustice. We therefore AFFIRM the district court's ruling.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION FILED NOVEMBER 21, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. 00-0303

JUDGE DONALD E. WALTER

MAGISTRATE JUDGE HAYES

PETRO-HUNT, L.L.C., ET AL.

VERSUS

UNITED STATES OF AMERICA, ET AL.

ORDER

Before this Court is plaintiffs' Motion for Trial [Doc. #201]. After reviewing plaintiffs' motion and the Fifth Circuit's mandate in *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385 (5th Cir. 2004), this Court finds that the only issue to be determined is which of the "95 servitudes that were not at issue in *Nebo Oil*" have in fact prescribed for nonuse. 365 F.3d at 399.

Accordingly, **IT IS ORDERED** that plaintiffs' Motion for Trial [Doc. #201] be and is hereby **DENIED.**

Appendix B

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 21st day of November, 2005.

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA FILED DECEMBER 7, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. CV00-0303 "S"

JUDGE WALTER

MAGISTRATE JUDGE HAYES

PETRO-HUNT, L.L.C.; HUNT PETROLEUM CORPORATION AND KINGFISHER RESOURCES, INC.

VERSUS

UNITED STATES OF AMERICA AND ASPECT RESOURCES, LLC,; BAYOU PETROLEUM COMPANY; CATAWBA ENERGY, INC.; FIRST TEXAS HYDROCARBONS, INC.; OSCAR C. FORLAND; GULF COAST OIL & GAS CO.; JUSTISS OIL COMPANY, INC.; MATRIX ENERGY, INC.; MB EXPLORATION LLC; NORTHSTAR ENERGY, LLC; PALMER PETROLEUM, INC.; RICE & ASSOCIATES, LLC; SNYDER OIL CORPORATION; HOWELL R. SPEAR; JOHN P. STRANG;

Appendix C

TEXACO EXPLORATION AND PRODUCTION, INC.; TMR EXPLORATION, INC.; UMC PETROLEUM CORPORATION; AND WHELESS TDL EXPLORATION CO., LLC

JUDGMENT

Before the court is plaintiffs' **PETRO-HUNT, L.L.C., HUNT PETROLEUM CORPORATION** and **KINGFISHER RESOURCES, INC.**, Alternative Motion for Summary Judgment pertaining to mineral servitudes which are held by drilling or production, and which have not prescribed, pursuant to Louisiana mineral law. After considering the motion and supporting memoranda and affidavits and noting that the government has not opposed the motion, the Court finds plaintiffs' Motion to be well founded and it is hereby GRANTED;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of plaintiffs, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc., and against defendants, United States of America; Aspect Resources, L.L.C.; Justiss Oil Company; MB Exploration, L.L.C.; Palmer Petroleum, Inc.; Snyder Oil Corporation, a/k/a Santa Fe Snyder a/k/a Devon SFS; John P. Strang; UMC Petroleum Corp. and its successor Ocean Energy Resources; Wheless TDL Exploration Co., Ltd.; Bayou Petroleum Company; First Texas Hydrocarbons, Inc.; Oscar C. Forland; Northstar Energy, L.L.C.; Howell R. Spear; Gulf Coast Oil & Gas

Co.; J. Bradley Jeffreys and Energy Arrow Exploration, L.L.C., declaring that the five mineral servitudes described in Exhibit "A," are owned by plaintiffs and, at this time, remain in full force and effect and have not prescribed because of interruption of prescription by drilling or production of minerals, pursuant to the Louisiana rules of prescription of mineral servitudes; consequently this court finds that plaintiffs are the owners in indivision of the five mineral servitudes described on Exhibit "A," as follows:

PETRO-HUNT, L.L.C.:	64.28572%
HUNT PETROLEUM CORPORATION:	16.80672%
KINGFISHER RESOURCES, INC.:	18.90756%

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all mineral leases issued by the United States of America on the five mineral servitudes described in Exhibit "A" are hereby cancelled and set aside as null and void and the **UNITED STATES OF AMERICA** shall cause the cancellation of all Oil, Gas or Mineral Leases which it has granted to any third party, that intrude onto the mineral servitudes described in Exhibit "A," and that such cancellation shall be filed in the records of the appropriate Parish of the situs of such lands and that a recorded copy of such cancellation shall be provided to plaintiffs.

Appendix C

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs hereby reserve the right to pursue any and all claims for damages, caused by or as a result of the issuance of all intrusive leases and any other claims they have against the United States of America in the U.S. Court of Federal Claims.

Ordered this 7th day of December, 2005.

s/ Donald Walter
UNITED STATES DISTRICT JUDGE

Exhibit A
(Property Description)
Omitted

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 31, 2004 REVISED MAY 28, 2004

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-30760 c/w
02-30786

PETRO-HUNT, L.L.C.; *et al.*,

Plaintiffs - Appellees,

VERSUS

UNITED STATES OF AMERICA, et al.,

Defendants,

UNITED STATES OF AMERICA,

Defendant - Appellant.

PETRO-HUNT, L.L.C., et al.,

Plaintiffs - Appellants,

versus

UNITED STATES OF AMERICA, et al.,

Defendants - Appellees.

Appendix D

Appeals from the United States District Court
for the Western District of Louisiana

Before EMILIO M. GARZA, and DENNIS, Circuit Judges, and VANCE*, District Judge.

DENNIS, Circuit Judge:

Petro-Hunt, L.L.C., Hunt Petroleum Corporation, and Kingfisher Resources, Inc., (collectively "Plaintiffs") filed a declaratory judgment action seeking to quiet title to mineral rights in approximately 180,000 acres of federally owned land within the Kisatchie National Forest. Plaintiffs claim those rights as successors in interest to 96 mineral servitudes that were created before the United States purchased the land in the 1930s. The district court granted summary judgment in favor of Plaintiffs on the grounds of *res judicata* and denied Plaintiff's request for attorneys' fees. The United States timely appeals the district court's grant of summary judgment and Plaintiffs cross-appeal on the issue of attorneys' fees. Because we reverse district court's summary judgment ruling and remand for further proceedings not inconsistent with this opinion, we need not reach the merits of Plaintiffs' cross appeal regarding attorneys' fees since plaintiffs are no longer prevailing parties.[1]

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* District Judge of the Eastern District of Louisiana, sitting by designation.

1. Prevailing party status is a prerequisite to recovering attorneys' fees under 28 U.S.C. § 2412(b).

Appendix D

I. Background

In order to give the proper context to our discussion of the merits of this factually dense case, we begin with a brief discussion on Louisiana mineral law, the servitudes in question, and the applicability of certain Louisiana laws to property owned by the United States.

A. *Mineral Servitudes Under Louisiana Law*

Louisiana law governing mineral servitudes does not recognize a separate mineral estate in oil and gas.[2] Mineral rights can be owned separate from the surface land only in the form of a mineral servitude.[3] Hence, any attempt to sell or reserve the ownership of oil and gas results in the creation of a mineral servitude, and the holder of that servitude has the right to enter the property and extract the minerals.[4] Louisiana law has long provided that a mineral servitude is extinguished

2. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207, 243-245 (1920).

3. *Central Pines Land Co. v. United States*, 274 F.3d 881, 884 (5th Cir. 2001).

4. *Central Pines*, 274 F.3d at 884. *See* La. R.S. § 31:21 ("A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."); *see also* Luther L. McDougal, III, *Louisiana Mineral Servitudes*, 61 Tul. L. Rev. 1097, 1098-99 (1987).

by prescription resulting from ten years' nonuse.[5] The period of prescription on mineral servitudes begins to run on the date a servitude is created,[6] and is interrupted only by "good faith operations for the discovery and production of minerals."[7]

Because the rule of prescription reflects a public policy favoring "the timely return of outstanding minerals to the owner of the land,"[8] the rule may not be abrogated by contract.[9] The Louisiana Supreme Court has declared that "it is against the public policy of this state to allow . . . servitudes to remain alive for a longer period than 10 years without use," and that any contracts to the contrary are void as against public policy.[10]

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5. *Central Pines*, 274 F.3d at 884. *See* La. R.S. § 31:27.

6. *See* La. R.S. § 31:28; *see also Ober v. Williams*, 213 La. 568, 35 So.2d 219, 224 (1948).

7. La. R.S. § 31:29.

8. *See Mire v. Hawkins*, 249 La. 278, 186 So.2d 591, 597 (1966).

9. *See Leiter Minerals, Inc. v. California Co.*, 241 La. 915, 132 So.2d 845, 853 (1961). On the other hand, agreements to shorten the period of prescription do not conflict with public policy and are valid. *Id.*

10. *Id.*

Appendix D

B. *Creation of Mineral Servitudes*

In 1932, five Louisiana lumber companies-Good Pine Lumber, Trout Creek Lumber, Tall Timber Lumber, Bodcaw Lumber, and Grant Timber-entered an agreement to pool the mineral rights on their respective land holdings in central Louisiana.[11] As part of the pooling agreement, the companies created a joint venture called the "Good Pine Oil Company" and separately conveyed to that company the rights to explore and develop their property for the production of oil, gas, and sulphur.[12] Of these conveyances, six that Bodcaw Lumber and Grant Timber made to Good Pine Oil between November 12, 1932, and May 3, 1934, are relevant to this case. All of these six conveyances involved multiple parcels of land, many of which were non-contiguous, and thus resulted in multiple mineral servitudes.[13]

Each of the six deeds conveying mineral rights to Good Pine Oil contained a clause providing that the ten

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11. *United States v. Nebo Oil*, 190 F.2d 1003, 1005 (5th Cir.1951).

12. *Id.*

13. *See Cox v. Sanders*, 421 So.2d 869, 873 (1982) (stating that "a landowner cannot create a single servitude or mineral royalty right on two or more non-contiguous tracts; and if this is attempted by a single instrument, there are nevertheless as many servitudes or royalty interests as there are non-contiguous tracts of land" and quoting *Whitehall Oil Co. v. Heard*, 197 So.2d 672, 675 (La. Ct. App. 1967)).

year period of liberative prescription applied. Five of the deeds expressly stipulated that "none of said [mineral] rights in any of said lands shall be prescribed *unless there shall elapse a full period of ten (10) years in which there shall be no exercise of any of the foregoing rights or user of any of the lands* aforesaid under and by virtue hereof." The sixth contained strikingly similar language. Because the prescriptive period described in these instruments is equivalent to the liberative prescription period of ten years, the contract provision applying a prescriptive period of ten years is enforceable.

C. *Acquisition by the United States*

In the late 1930s, the United States acquired approximately 180,000 acres of land in three Louisiana parishes (Grant Parish, Natchitoches Parish, and Winn Parish) from Bodcaw Lumber and Grant Timber for inclusion in the Kisatchie National Forest. The United States acquired the lands under the Weeks Forestry Act[14] through nine acts of sale and two judgments in condemnation.[15] Each of these eleven conveyances came after the six transactions in which Bodcaw Lumber and Grant Timber conveyed mineral rights on the lands to Good Pine Oil. Consequently, at the time of acquisition, the approximately 180,000 acres of land that the United States acquired was burdened by 96 separate mineral servitudes in favor of Good Pine Oil.

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14. 16 U.S.C. § 515.

15. The record shows that the United States acquired the lands between November 28, 1934, and January 28, 1937.

Appendix D

The eleven instruments of transfer (nine deeds and two judgments) conveying the lands to the United States addressed the pre-existing mineral servitudes in different ways. All but one of the instruments contained language stating that the conveyances were "subject to" one or more of the mineral deeds granting rights to Good Pine Oil. Most of these transfer instruments contained an additional clause stating that the "mention" of the earlier mineral reservation was "made solely for the purpose of limiting vendor's warranty to the United States in present sale, and *the recital of the said Mineral Sale shall in nowise extend or enlarge the same in point of time.*"

Five of the instruments (four deeds and one judgment) also contained additional mineral reservations in the name of Bodcaw Lumber or Grant Timber, which were to become effective upon the prescription of the relevant servitudes held by Good Pine Oil. For example, the February 11, 1936 deed conveying 24,943.93 acres owned by Bodcaw Lumber "specially reserved" unto Bodcaw Lumber "all of the oil, gas and other minerals . . . subject to the sales to Good Pine Oil Company, Incorporated, for a period of ten years after the expiration of the rights of the said Good Pine Oil Company, Incorporated, under the laws of the State of Louisiana." This deed further provided that this "specially reserved" right would be extended beyond ten years if the right were exercised in a particular fashion, and that if the original ten year period or any extended period terminated for nonuse, "a complete fee in the land [would] become vested in the United States." The other

four instruments also contained clauses granting reversionary mineral interests to Bodcaw Lumber or Grant Timber upon the prescription of the Good Pine servitudes.[16] Each of the instruments stated that at the termination of the reservations, the United States would hold the land in "complete fee."

D. *Act 315*

In 1940, well after the mineral and land transactions described above were complete, the Louisiana Legislature passed Act 315 to eliminate the rule of prescription for mineral rights on lands held by the United States:

> [W]hen land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America . . . , and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and

16. Because the Good Pine servitudes were still in effect, the "reversionary" clauses were invalid. *See Liberty Farms v. Miller*, 216 La. 1023, 45 So.2d 610, 614 (La. 1950) ("One may not reserve reversionary rights to minerals when he is not the owner of the minerals at the time the reservation is made. It is settled that, in such instances, the reservation is ineffective and the outstanding mineral interests revert to the person owning the land at the time prescription accrues.").

> effect, said rights so reserved or previously sold shall be imprescriptible.[17]

The purpose of the Act was to facilitate the federal government's purchase of large tracts of land for National Forests, National Parks, military installations, and like purposes.[18] The United States was having difficulty acquiring such tracts in Louisiana because landowners who wished to retain mineral rights were reluctant to sell their land for fear of losing mineral reservations through prescription.[19] By making mineral servitudes on federal land "imprescriptible"-and thus "prevent[ing] the federal government from acquiring mineral rights by prescription"-Act 315 also served Louisiana's interest in taxing and regulating minerals on federal land, powers that would be in doubt should ownership of the minerals be vested in the United States.[20]

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17. *See* 1940 La. Acts 315; *see also* La. R.S. § 31:149.

18. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 599 & n. 16, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973) (citing *Leiter Minerals*, 132 So.2d at 851).

19. *Leiter Minerals*, 132 So.2d at 851.

20. *Id.* at 851-52, 854; *see also Little Lake Misere*, 412 U.S. at 599-600, 93 S.Ct. 2389 (citing *Leiter Minerals*).

Appendix D

E. *Nebo Oil*

In 1948, the United States filed a declaratory judgment action against the Nebo Oil Company to quiet title to the minerals on a particular servitude claimed by Nebo Oil as successor in interest to Good Pine Oil.[21] The complaint referred to a specific parcel, approximately 800 acres in size, lying in portions of section 19 (Township 13 North, Range 6 West) and section 24 (Township 13, Range 7 West) in Natchitoches Parish. This parcel was one of several parcels acquired by the United States through a February 11, 1936 deed from Bodcaw Lumber, which totaled 24,943.93 acres. Nebo Oil claimed a mineral servitude on the 800-acre parcel as a result of a November 12, 1932 conveyance of mineral rights from Bodcaw to Good Pine Oil.

In its complaint, the United States averred: (1) that no drilling operations had been conducted on the 800-acre parcel during the ten year period beginning on November 12, 1932; (2) that the mineral servitude on the parcel had therefore prescribed for nonuse; and (3) that Nebo Oil intended to drill a well on the land and had advised the government that the company would resist interference. To prevent injury to its property, the United States sought declaratory relief and an order permanently enjoining Nebo Oil from entering the 800-acre parcel for mineral production.

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21. Sometime after December 1941, Nebo Oil Company acquired all of the mineral rights formerly held by Good Pine Oil. *See Nebo Oil*, 190 F.2d at 1006.

Appendix D

In denying the United States relief, the District Court for the Western District of Louisiana held that the 800-acre servitude had been rendered "imprescriptible" by Act 315.[22] This court affirmed that judgment.[23] First, this court found that it was bound by Louisiana precedent holding that rules of prescription, including Act 315, "are retrospective in their operation."[24] Second, we held that Act 315's elimination

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22. *See United States v. Nebo Oil*, 90 F.Supp. 73 (W.D. La. 1950).

23. *See Nebo Oil*, 190 F.2d at 1003. The district court's final decree in *Nebo Oil* included a broad finding that the prescriptive periods of the Louisiana Civil Code "do not apply to lands purchased by the United States under the Weeks Act, as amended, for national forest purposes. . . ." The court further found that "under the terms of the deed from Bodcaw Lumber . . . to Good Pine Oil . . . dated November 12, 1932, and the deed from Bodcaw Lumber . . . to the United States of America dated February 11, 1936, the oil, gas and sulphur in, on and under the lands conveyed to the United States under such deed . . . , which deed covered the lands herein involved, were vested in perpetuity in Good Pine Oil . . . , its successors and assigns, and, through it, in the defendant herein, as its successor in interest." Despite the breadth of these findings, the district court returned to the property that was actually before it when it concluded its decree: "IT IS NOW ORDERED, ADJUDGED AND DECREED that the oil, gas, and sulphur in, on and under the lands described in the complaint are vested in perpetuity in Nebo Oil Company, Inc., its successors and assigns."

24. *See Nebo Oil*, 190 F.2d at 1008 (citing *Whitney Nat'l Bank of New Orleans v. Little Creek Oil Co.*, 212 La. 949, 33 So.2d 693 (1947)).

of the rule of prescription as to servitudes on federal land did not dispose of federal property in violation of Article IV, Section 3, clause 2 of the United States Constitution or violate the Contract Clause of the Constitution or the Due Process Clause of the Fourteenth Amendment. The apparent reasoning was that the United States's interest in reclaiming the mineral rights through prescription was not a vested right at the time Act 315 was passed because the Good Pine servitudes had been created less than ten years earlier.[25]

F. *After Nebo Oil*

Subsequent to our decision in *Nebo Oil*, there were two decisions concerning the retroactive applicability of Act 315 to mineral servitudes located on property owned by the United States. First, in *United States v. Little Lake Misere Land Company*, the government sued to quiet title in two adjacent parcels of land in Cameron Parish, Louisiana, which it had acquired under the Migratory Bird Conservation Act.[26] The instruments of acquisition-a 1937 deed and a 1939 judgment in condemnation-reserved to Little Lake Misere oil, gas, sulphur, and other minerals for a period of ten years from

25. *See id.* at 1008-10; *see also id.* at 1008 ("It cannot be considered a vested right if it is nothing more than a mere expectation, or hope, based upon an anticipated continuance of the applicable general laws.").

26. 412 U.S. at 582, 93 S.Ct. 2389.

the date of vesting of title in the United States.[27] But those instruments further provided that if the initial ten year period ended and no production was occurring, or if operations subsequently ceased for more than sixty days, "the right to mine, produce and market said oil, gas, sulphur or other mineral shall terminate . . . and the complete fee title to said lands shall thereby become vested in the United States."[28] Nevertheless, following the enactment of Act 315, the servitude holder, Little Lake Misere, asserted that the reservations had become "imprescriptible."

In a brief per curiam opinion, this court held in favor of the servitude holder, finding that the contractual terms of prescription did not apply to the servitudes in question in the light of Act 315.[29] This holding was based on our prior decision in *Nebo Oil* regarding the constitutionality of the retroactive application of Act 315.[30]

But the United States Supreme Court granted certiorari and reversed.[31] In so doing, the Court did not

27. *Id.*

28. *Id.* at 583, 93 S.Ct. 2389.

29. *See United States v. Little Lake Misere Land Co.*, 453 F.2d 360 (5th Cir. 1971).

30. *Id.* at 362.

31. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 93 S.Ct. 2389 (1973).

expressly reject our interpretation of Louisiana law or the analysis of Act 315's constitutionality in *Nebo Oil.* Instead, invoking the choice-of-law doctrine of *Clearfield Trust Co. v. United States,*[32] the Supreme Court held that this court erred in presuming, as a threshold matter, that Louisiana state law applied.[33] Furthermore, because *Little Lake Misere* involved a determination of rights under a land acquisition agreement that was "explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act" and "to which the United States itself is a party," the Supreme Court held that it was for the federal courts to "fashion" the governing rule of law in that case.[34] Determining that Act 315 would deprive the United States of "bargained-for-contractual interests" by abrogating the terms of the acquisition instruments relating to prescription, the Supreme Court held that the Act was "plainly hostile to the interests of the United States" and could not be "borrowed" as the rule of decision.[35] Finally, the Supreme Court held that the appropriate rule of decision was to be supplied by either federal common law or "residual" state law (*i.e.*, state law without Act 315), both of which would give effect to the contract terms.[36]

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32. 318 U.S. 363, 63 S.Ct. 573 (1943).

33. *See Little Lake Misere,* 412 U.S. at 591, 93 S.Ct. 2389.

34. *See id.* at 594, 93 S.Ct. 2389.

35. *Id.* at 596, 93 S.Ct. 2389.

36. *Id.* at 604, 93 S.Ct. 2389.

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The second decision pertinent here was *Central Pines Land Company v. United States.*[37] In that case, we were called upon to revisit our *Nebo Oil* ruling in the light of the Supreme Court's opinion in *Little Lake Misere.*[38] The facts of *Central Pines* were quite similar to those of *Nebo Oil.* First, like *Nebo Oil, Central Pines* involved the acquisition of land by the United States in the 1930s for the Kisatchie National Forest.[39] Second, also like *Nebo Oil,* the lands so acquired were subject to a preexisting mineral servitude.[40] Finally, the successor in interest to the servitude owner also argued that Act 315 had rendered the servitude in *Central Pines* "imprescriptible."[41]

Despite the factual similarities between *Central Pines* and *Nebo Oil,* and perhaps taking a cue from the Supreme Court's *Little Lake Misere* decision, this court ruled that Act 315 did not apply to *Central Pines.*[42] While we declined to expressly overrule *Nebo Oil*'s constitutional analysis, we also rejected the presumption in *Nebo Oil* that Louisiana law governed the terms of

37. 274 F.3d 881.

38. 274 F.3d at 881.

39. *See id.* at 885.

40. *Id.*

41. *Id.* at 886.

42. 274 F.3d at 886.

the transactions at issue.[43] In particular, following the analysis of *Little Lake Misere*, this court held that the right asserted by the United States – *i.e.*, the right to reclaim mineral interests through prescription – was a right acquired through a duly authorized federal land acquisition agreement and, therefore, that federal choice-of-law principles applied.[44]

Applying these principles, the *Central Pines* court determined that Act 315 could not be borrowed as the rule of decision because, as in *Little Lake Misere*, it was hostile to the government's contractual interests in reclaiming minerals through the "legal rules in place at the time of contract."[45] While acknowledging that this interest was "arguably not as powerful as the federal right to enforce explicit contractual terms" (the right at stake in *Little Lake Misere*), we determined that this interest outweighed any state interest in applying Act 315.[46] Noting that the "main justification" for Act 315 was to facilitate federal land acquisitions, this court observed that "[such] justification has no bearing on retroactive application of Act 315, because an acquisition cannot be facilitated by a law not yet in existence."[47]

43. *Id.* at 889-90.

44. *Id.* at 888-90.

45. *Id.* at 891.

46. *Id.* at 891-92.

47. *Id.* at 892 (citing *Little Lake Misere*, 412 U.S. at 599, 93 S.Ct. 2389).

Finally, in recognition of the federal interest in the general rule of prescription, we also determined that the proper rule of decision was "residual" state law, *i.e.*, Louisiana law without Act 315.[48]

G. *The Present Dispute*

In the 1990s, the United States began granting mineral leases on certain Forest Service lands that had been burdened by Good Pine servitudes but were not involved in *Nebo Oil*. The government regarded these servitudes as prescribed for ten years' nonuse. In determining that the servitudes were subject to the rule of prescription, rather than Act 315, the United States relied on the Supreme Court's ruling in *Little Lake Misere*.

In response to this leasing activity, the Plaintiffs, who are successors in interest to Nebo Oil Company, initiated this declaratory judgment action on February 18, 2000. Their complaint named the United States and various parties to whom the United States granted mineral leases or offers to lease on lands that are or were burdened by Good Pine servitudes as defendants. Plaintiffs sought a ruling declaring that they are the owners, in perpetuity, of those servitudes and that the mineral leases and offers to lease issued by the United States were therefore null and void. The United States argued in response to the Plaintiffs' complaint that the 95 separate mineral servitudes through which the

48. *Id.*

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Plaintiffs claim mineral rights are subject to prescription for nonuse and that the relevant leases and offers to lease relate to lands on which the servitudes claimed by Plaintiffs have already prescribed.

Plaintiffs filed a motion for summary judgment[49] in the district court. In their motion, Plaintiffs argued that they were entitled to judgment as a matter of law because *Nebo Oil* and the doctrine of *res judicata* or collateral estoppel[50] would bar any defense raised by the

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49. Plaintiffs actually filed two motions for summary judgment. In their second summary judgment motion, Plaintiffs argued that even if the rule of prescription applied, five servitudes burdening nearly seventy percent of the 180,000 acres in dispute had not prescribed because they had exercised their rights through continuous drilling operations. The United States conceded that sufficient drilling operations had interrupted the running of prescription on some of the servitudes and introduced evidence regarding the particular histories of each of the 96 Good Pine servitudes. But the district court dismissed this second motion as moot due to its *res judicata* determination and expressly declined to consider the issue of whether sufficient drilling operations interrupted the prescriptive period as to any particular servitude. Because we reverse the district court's grant of summary judgment and because the district court has not had an opportunity to pass on the question of what servitudes may have prescribed, we will not reach the merits of Plaintiffs' second motion and remand this issue to the district court.

50. Although Plaintiffs did not specifically use the term "collateral estoppel" in their motion for summary judgment, Plaintiffs' argument in favor on the motion was based on *res judicata*. "The rules of *res judicata* encompass two separate

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United States as to the prescriptibility of the servitudes. The United States opposed the Plaintiffs' motion for summary judgment.

H. *The District Court's Ruling*

On December 18, 2001, the district court issued a memorandum ruling granting the Plaintiffs' motion for summary judgment. Holding that *res judicata* barred the United States's asserted defenses to Plaintiffs' claim of ownership due to this court's decision in *Nebo Oil*, the district court declared that Plaintiffs were "the exclusive owners in perpetuity of the approximately 180,000 acres of mineral servitudes at issue in this case." The district court based its ruling on this court's decision in *Nebo Oil*. The court noted that the 800-acre servitude addressed in *Nebo Oil* burdened a parcel of land that the United States acquired in 1936 as part of a larger purchase of 24,943.93 acres and that all 24,943.93 acres were burdened by mineral servitudes that were owned in common with the 800-acre servitude. Because the *Nebo Oil* decision referred to the 24,943.93-acre transaction, the district court found that *Nebo Oil* "applied Act 315 of 1940 to the mineral reservation and sale of the 24,943.93 acre tract" and that " *res judicata*

(Cont'd)
but linked preclusive doctrines: (1) true *res judicata* or claim preclusion and (2) collateral estoppel or issue preclusion." *See St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 436 (5th Cir. 2002)(internal citation omitted). Because these two doctrines are separate, collateral estoppel will be analyzed separately in this opinion.

clearly applies" to disputes over the minerals on this tract.

As for the remainder of the approximately 180,000 acres of land-acquired by the United States in ten additional transactions that were not specifically addressed in *Nebo Oil*-the district court found that *res judicata* was also applicable due to the factual similarity in the transactions. Specifically, because of the similarities in the transactions through which the United States acquired the lands and in the earlier transactions creating mineral servitudes on the land, the district court stated: (1) that "the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil* "; (2) that the United States had a "full and fair opportunity" (in *Nebo Oil*) to "litigate the application and constitutionality of Louisiana Act 315 to this mineral property"; and (3) that "[t]he government should not be allowed to litigate now that which it could have litigated 50 years ago."

Accordingly, the district court entered a final judgment on May 29, 2002. The United States timely appealed.

II. Analysis

The critical issue before this court focuses on whether the United States is precluded from challenging Plaintiffs' assertion of ownership over all 96 of the mineral servitudes arising from their status as successors in interest to Good Pine Oil. Because the

district court granted summary judgment, we review that decision *de novo.*[51]

A. *Res Judicata-A Claim Precluded by Sameness?*

"Claim preclusion, or *res judicata*, bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."[52] The test for *res judicata* has four elements: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.[53] In this case, there is no dispute over the competency of the *Nebo Oil* court, the finality of its judgment in that case, or the sameness of the parties. The only dispute is whether this case involves the same claim or cause of action as *Nebo Oil.*

To determine whether two suits involve the same claim or cause of action, this court has adopted the transactional test of the Restatement (Second) of

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51. *Central Pines*, 274 F.3d at 886.

52. *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999). *See Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979) ("*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.").

53. *Southmark*, 163 F.3d at 934.

Judgments, § 24.[54] Under that test, the preclusive effect of a prior judgment extends to all rights the original plaintiff had "with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] action arose."[55]

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.[56]

"[T]he critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts.*"[57]

Contending that this action is not based on the same nucleus of operative facts as the action in *Nebo Oil*, the

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54. *Id.* (citing *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870-71 (5th Cir. 1984)).

55. Restatement (Second) of Judgments § 24(1) (1982).

56. *Id.* § 24(2).

57. *Southmark*, 163 F.3d at 934 (internal quotation and citation omitted).

United States points out that it initiated the *Nebo Oil* litigation in response to learning that Nebo Oil intended to conduct drilling operations on a particular 800-acre parcel of federal land under a mineral servitude that, in the view of the United States, had prescribed.[58] The operative facts of that action included: (1) the United States's purchase of the 800-acre parcel from Bodcaw Lumber on February 11, 1936; (2) the creation of the mineral servitude burdening that parcel in a November 11, 1932 conveyance from Bodcaw Lumber to Good Pine Oil; and, most importantly, (3) the history of use or nonuse of that servitude. In contrast, the United States argues that the rights asserted by the parties in this case depend on ten additional federal land acquisitions, five additional mineral conveyances to Good Pine Oil, and the drilling histories on 95 additional servitudes.

The district court found that it did not "need to delve into such matters as what constitutes contiguous tracts, the number of servitudes, and whether prescription of nonuse was interrupted by good faith operations for the discovery and production of minerals." The district court reasoned that it was "faced with what may be viewed as a primarily legal question." Because all of the Good Pine servitudes were similarly situated with respect to application of Act 315, the court did not expressly identify the operative facts of this case and *Nebo Oil* and determine that they were the same. Instead, the district court relied on the fact that *Nebo Oil* addressed a federal

58. The United States acknowledges that it is precluded, as a matter of *res judicata*, from re-litigating title to the 800-acre mineral servitude at issue in *Nebo Oil*.

land acquisition and the similarity among that acquisition and the other ten acquisitions at issue here.

But the district court's reliance on the factual similarities among the various servitudes and land acquisitions was misplaced. As the United States correctly points out, these observations of factual similarity, although potentially relevant for purposes of collateral estoppel, are not relevant to *res judicata.* Collateral estoppel prevents parties from re-litigating the same issues conclusively determined between them in a previous action. Although similar in principle, true *res judicata* is concerned with a sameness of operative facts. Neither the Plaintiffs nor the district court have identified a principle of *res judicata* that requires an owner of separate properties to litigate title to all of those properties in response to a threat to his right of full use and enjoyment of only one of them.[59] While an action to quiet title in one property may raise the same legal issues that would also be in question in an similar type of action

59. Like the district court, the Plaintiffs seize on the Supreme Court's statement in *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983), that "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water." While this is certainly true, nothing in the *Nevada* opinion undermines theprinciple that the doctrine of *res judicata* does not bar a second action unless it is the "same cause of action" as the first one. *See id.* at 130 ("To determine the applicability of *res judicata* to the facts before us, we must decide first if the 'cause of action' which the Government now seeks to assert is the 'same cause of action' that was asserted [previously].").

involving a similarly situated property, the operative facts of the two actions would be distinct.

In this case, each of the Good Pine servitudes was a distinct real right under Louisiana law.[60] The *Nebo Oil* action involved one servitude burdening an 800-acre parcel of land and was filed in response to a threat to the United States's asserted right of full use and enjoyment of that land. The United States took the position that the servitude was subject to prescription and had prescribed, and therefore it had to show ten years' nonuse *of that particular servitude* to succeed on its claim. The existence and use histories of the other Good Pine servitudes were not operative facts of either the government's claim or Nebo Oil's defense to that claim. Although the reasoning of *Nebo Oil* that the Good Pine servitudes were imprescriptible due to Act 315-made the use histories irrelevant as a matter of law, each servitude remained a distinct real right. If *Nebo Oil* remains good law, this court's holding that Act 315 rendered the Good Pine servitudes imprescriptible is final and conclusive between the United States and the Plaintiffs as a matter of collateral estoppel. But *res judicata* is no bar to the United States's defense in this action because its claim with respect to each servitude depends on a unique set of operative facts. Thus, if the United States's defense of this action is limited, it would be limited only under collateral estoppel.

60. *See* McDougal, *supra* note 4, at 1099.

Appendix D

B. *Collateral Estoppel-An Issue Precluded by Prior Litigation?*

Collateral estoppel precludes a party from litigating an issue already raised in an earlier action between the same parties[61] only if: (1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action.[62] In this circuit, collateral estoppel applies to "pure questions of law" only when there has been no "change in controlling legal principles."[63] The United States contends that

61. "Mutuality" is a prerequisite only when the party to be estopped is the United States. *See United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984).

62. *Stripling v. Jordan Prod. Co.*, LLC, 234 F.3d 863, 868 (5th Cir.2000).

63. *See, e.g., Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1167 (5th Cir.1981)(discussing the effect of *Montana v. U.S.*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) on the exception to collateral estoppel explained in *U.S. v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948), and concluding that post-*Montana*, *Sunnen* stands only for the proposition that "estoppel would not apply where there had been a change in controlling legal principles between the two decisions."); *EEOC v. Am. Airlines, Inc.*, 48 F.3d 164, 170 (5th Cir.1995)(quoting *Montana*, 440 U.S. at 161, 99 S.Ct. 970, for the proposition that "a significant change in the legal climate may defeat collateral estoppel where modifications in controlling legal principles . . . could renders a previous determination inconsistent with the prevailing

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collateral estoppel does not apply in the present case because it seeks to raise issues that are not identical to the issues litigated in *Nebo Oil* and, in any event, there has been a change in controlling legal principles. We agree.

In ruling that the United States is precluded from re-litigating the applicability of Act 315 to the Good Pine servitudes, the district court did not specify what particular issues were actually litigated in *Nebo Oil.* But, as the United States discusses in its brief, the question of Act 315's applicability to this case can be divided into three distinct sets of legal issues. First, there are threshold choice-of-law issues, including whether the rights arising out of the federal land acquisitions are governed by state law (including Act 315) or by federal law, and, if federal law governs, whether and what provisions of state law should be "borrowed" to provide the rules of decision.[64] Second, there are issues regarding

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doctrine."); *RecoverEdge, L.P. v. Pentecost*, 44 F.3d 1284, 1291 (5th Cir. 1995)(stating "As one treatise points out, however, 'courts have readily perceived that for purposes of preclusion, 'issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits is the same,' ' " citing 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4417, at 165 (footnote omitted) (quoting *Peterson v. Clark Leasing Corp.*, 451 F.2d 350, 354 n. 1 (5th Cir.1991)(explaining that "not only the facts, but also the legal standard used to assess them, must be identical" and citing *Southern Pac. Transp. Co. v. Smith Material Corp.*, 616 F.2d 111, 115 (5th Cir. 1980)).

64. *See Little Lake Misere*, 412 U.S. at 590-604; *Central Pines*, 274 F.3d at 887-92.

the interpretation of Act 315 under state law, including the question whether Act 315 is to be applied retroactively. Finally, there are issues concerning whether applying Act 315 retroactively is constitutional. That these issues are distinct legal issues cannot be doubted after this court's ruling in *Central Pines*.[65]

Nebo Oil only addressed the latter two sets of issues.[66] That is, in *Nebo Oil*, this court assumed the applicability of Act 315, confined its analysis to an interpretation of the Act under state law, and determined that the Act did not violate the federal constitution.[67] In the present case, the United States does not seek to revisit the issues actually addressed in *Nebo Oil*. Instead, it seeks to raise the threshold choice-of-law issue that *Nebo Oil* did not address because it was presumed. In particular, the United States contends that: (1) federal law governs the rights arising out of its acquisition of the lands at issue in this case;[68] (2) Act 315 may not be borrowed as the rule of decision because it is hostile to the United States's contractual interests;[69] and (3) the

65. *See* 274 F.3d at 889-90.

66. *See id.* (describing the scope of *Nebo Oil*).

67. *See id.*

68. *See Little Lake Misere*, 412 U.S. at 594, 93 S.Ct. 2389; *Central Pines*, 274 F.3d at 887-90.

69. *See Central Pines*, 274 F.3d at 890-92.

rule at the time of the contract (*i.e.*, the Louisiana rule of prescription) should govern.[70]

Because these questions of law are not "identical" to the issues raised in *Nebo Oil* and were not "actually litigated" in *Nebo Oil*, we find that the United States is not precluded, under collateral estoppel, from raising them in this case.[71] Although the Plaintiffs cite scattered portions of both the district court's opinion and the United States's brief in *Nebo Oil* in an effort to show that the choice-of-law issue was determined in that action, we stand by our prior finding in *Central Pines* that it was not.[72]

Nevertheless, even if the choice-of-law issue had been raised in *Nebo Oil*, changes in the controlling legal principles prevent the United States from being precluded from litigating the issue in this case.[73] After

70. *See id.* at 892.

71. *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir. 1995).

72. *See* 274 F.3d at 889-90.

73. The Plaintiffs' argument that the Supreme Court's decision in *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984), compels a contrary conclusion is mistaken. In that case, there had been no change in controlling legal principles between the first and the second action. *See id.* at 170, 104 S.Ct. 575. The Court was concerned, instead, with the exception to the otherwise applicable rules of

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the decisions in *Little Lake Misere* and *Central Pines*, it is clear that federal law governs the choice-of-law decision presented by the facts of this case. Hence, we are prohibited from borrowing Act 315 as the federal rule of decision because it is hostile to the federal interests at stake.[74]

III. Conclusion

Because neither *res judicata* nor collateral estoppel preclude the United States from challenging Plaintiffs' assertion of ownership over the mineral servitudes in question, we reverse the district court's grant of summary judgment. In addition, we find that the 95 servitudes that were not at issue in *Nebo Oil* are subject to the contractual provisions permitting prescription after ten years' nonuse. Accordingly, we remand this case so that the district court can determine which servitudes have in fact prescribed.

REVERSED AND REMANDED.

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preclusion for "unmixed questions of law" arising in "successive actions involving unrelated subject matter." *See id.* The United States does not rely on this exception in this case.

74. *See Central Pines*, 274 F.3d at 888-90.

APPENDIX E — MEMORANDUM RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION FILED DECEMBER 18, 2001

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. 00-0303

JUDGE DONALD E. WALTER

MAGISTRATE JUDGE PAYNE

PETRO-HUNT L.L.C., ET AL

VERSUS

UNITED STATES OF AMERICA, ET AL

MEMORANDUM RULING

Before this Court is a Motion for Summary Judgment [Doc. 85] and a Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment [Doc. 142], filed on behalf of the Plaintiff, Petro-Hunt, L.L.C., Hunt Petroleum Corporation, and Kingfisher Resources, Inc. (Petro-Hunt), pursuant to Federal Rule of Civil Procedure 56. Defendants, United States of America, et al., oppose the Motion [Doc. 133].[1] For the

1. The number and relationship of the co-defendants with the United States of America requires a comment. Though this (Cont'd)

reasons assigned herein, Plaintiff's motion is GRANTED and Plaintiffs, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc.

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Court is not presented with any contractual disputes (cross-claims) between mesne defendants and the United States, the fate of certain leaseholds obtained by the various defendants hinges upon the ownership of the various mineral servitudes, which is distinctly at issue in this case. Article 114 of the Louisiana Mineral Code (La. R. S. § 31:114) states, "A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals." Though the mineral lease has been characterized in a seemingly conflicting manner, as being both a real right and giving rise to a contractual relationship (*See* comment to La. Min. Code art. 16), none would dispute that a valid mineral lease must be originally obtained from a lessor having an executive or ownership interest in the underlying mineral rights (*See* La. Min. Code art. 116) or one who thereafter acquires such an interest (*See* La. Min. Code arts. 144 & 145). All named defendants claim to own rights as lessees (and likely also as assignees), which are dependant upon the United States, as lessor, ultimately having an executive or ownership interest in the mineral rights at issue. Such is evidenced by plaintiff's motion to pretermit entry of judgment by default against certain defendants other than the United States, until the Court settles the title dispute between it and the United States [Doc. 58] and by certain defendant's adoption by reference of the briefs of the United States [Does. 123, 126 & 131]. Simply put, the various defendants interests are, for the moment, aligned with the United States and ultimately dependant upon the United States prevailing. Therefore, for clarity's sake, this Court will not delve into contractual relationships between the various defendants and the United States and, for purposes of this memorandum, will refer to and treat the defendant, as being the United States.

are hereby declared the exclusive owners in perpetuity of the approximately 180,000 acres of mineral servitudes at issue in this case and being more fully described in Plaintiff's Complaint [Doc. 1].

BACKGROUND

The case at bar cannot be properly framed without an examination of the Fifth Circuit's *United States v. Nebo Oil Co.*[2] opinion, as it provides both the historical backdrop and the grounds for Petro-Hunt's pivotal assertion of *res judicata* and/or claim preclusion.[3] This Court includes the following lengthy, but relevant, quotations because it reflects the view of a panel of judges much closer in time and in possession of the full record:

> This suit was brought by the appellant, United States of America, against the appellee, Nebo Oil Company, Inc., for a judgment declaring that appellant is the owner of the minerals . . . underlying approximately eight hundred acres of land located in the Parish of Natchitoches, States of Louisiana. A trial was had by the court without a jury

2. 190 F.2d 1003 (5th Cir. 1951).

3. While *res judicata* generally refers to claim preclusion, it is sometimes used when referencing issue preclusion. For purposes of this Memorandum, use of *res judicata is* synonymous with claim preclusion.

and judgment was entered dismissing the complaint.

The undisputed facts are these: In the year 1932 five lumber companies decided to pool the mineral rights in their lands in order to secure more favorable exploration and development thereof, it being agreed by the parties that each would share in any production obtained from the pooled acreage in proportion to the acreage which each lumber company contributed to the pool. For that purpose, the Good Pine Oil Company was organized . . . .

One of these conveyances to Good Pine Oil was by recorded deed from the Bodcaw Lumber Company, dated November 12, 1932, covering all of the oil, gas and sulphur underlying a tract of land containing 37, 532.13 acres of which the 800 acres of land here involved was a part.

Prior to the year 1936 the United States was interested in purchasing lands in Louisiana for national forest purposes and had found that owners of large tracts of land were unwilling to sell their lands because of court decisions holding that the sale or reservation of mineral rights in Louisiana created only a right in the nature of a servitude which was subject to prescription by ten years nonuser

[sic]. However, the United States Department of Agriculture, Forest Service, was not in accord with this view and on May 29, 1935, submitted to Bodcaw Lumber Company an opinion of the Assistant Solicitor of the Department of Agriculture to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes.

Thereafter, on February 11, 1936, Bodcaw sold to the United States a tract of timber land containing 24,943.93 acres, of which the 800 acre tract whose minerals had previously been conveyed to Good Pine Oil formed a part. . . .

At the time the sale was made, the officers and directors of Bodcaw believed that the mineral rights in the lands sold were valuable and the price of $1.75 per acre paid by appellant for the timber lands acquired under the 1936 deed did not reflect the value of any mineral rights. Moreover, the uncontradicted testimony is that Bodcaw would not have sold the timber lands to the United States had its representatives then taken the position, as they do now, that the prescriptive provisions of the Louisiana Civil Code would be applicable to the lands sold.

In December 1941 the Good Pine Oil Company was dissolved . . . . [and] Nebo Oil

Company, was organized and by mesne conveyances acquired all of the mineral rights formerly held by Good Pine Oil.

It was stipulated by and between the parties that no drilling operations have been conducted on the 800 acres of land involved or on lands contiguous thereto. However, it appears that the mineral rights acquired by Good Pine Oil by virtue of the 1932 deed from Bodcaw were exercised by the drilling of five separate wells between October 1941 and October 1948, three of which were located on lands conveyed to the United States under the 1936 deed from Bodcaw . . . .

The gravamen of the complaint is that no drilling operations were conducted on the lands in suit during the ten years period beginning November 12, 1932; and that consequently any mineral rights owned by Good Pine Oil or its successor, Nebo Oil, had prescribed by ten years of nonuser [sic] of the servitude. For answer, Nebo Oil denied that the mineral rights had prescribed and set up the defenses, among others, that there had been an interruption of the ten year prescriptive period for the reason that the minerals underlying the 800 acre tract were pooled with other minerals which had been developed, and exercise of the servitude on any part of the pooled acreage interrupted

> prescription with respect to all of the minerals included in the pool; and that the mineral rights were imprescriptible by virtue of Act 315 of the Louisiana Legislature of 1940.[4]

The Court first rejected Nebo Oil's defense that the pooling of the lands interrupted prescription, finding that the pooling agreement was never recorded and thus could not affect third parties.[5]

Next, the Court addressed the Constitutionality of Act No. 315 of 1940, which derogated from the default rules applicable to the extinguishment of mineral servitudes and established a rule of imprescriptability for those servitudes burdening lands purchased or

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4. *Id.* at 1005-06.

5. *Id.* at 1007. The Court likely addressed this issue first and directly because of basic abstention doctrine concerns. If the Court had found interruption of prescription by pooling it could have avoided the constitutional questions presented. Otherwise, one could view the interruption of prescription by pooling as a moot issue in light of the Court's application of Act 315 to the servitude at issue. Approaching this from a *res judicata* perspective, as opposed to a Constitutional mindset, such an issue or other issues relating to prescription need not be addressed first and may be properly viewed as moot in the event *res judicata* is held to bar such a claim. Therefore, this Court need not entertain plaintiff's motion for summary judgment on alternative grounds of interruption of prescription [Doc. 88] nor defendant's contentions in such regards.

expropriated by the United States.[6] The Court found that Act 315 was retroactively applicable, "because of the general rule of law established by the jurisprudence of this State that laws of prescription and those limiting the time within which actions may be brought are retrospective in their operation."[7] The Court further found that the scheme of acquisitive prescription cannot give rise to a vested right and is "nothing more than a

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6. Act 315 of 1940 reads in pertinent part, to wit: "Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible."

7. *Id.* at 1008 *(citations ommitted).* Stating that the statute was retroactively applied is a bit of a misnomer. Act 315 of 1940 was merely applied from the moment of its legislative birth, with the result that application in 1940 may have had retroactive effect upon previously contemplated contractual or legislatively authorized expectations. Put squarely, those outstanding mineral servitudes which had not prescribed at the time Act 315 of 1940 was enacted would never prescribe and the hopes of the surface owner would have been defeated. All the outstanding, yet unprescribed, mineral interests were now made imprescriptable. True retroactive application would have meant that prior mineral rights which had prescribed to the governmental landowner would have been undone. This is not what happened, as such rights would have been "vested."

mere expectation, or hope, based upon an anticipated continuance of the applicable general laws."[8] The court concluded "that this so-called 'reversionary interest' is nothing more than a mere expectancy, or hope, based upon an anticipated continuance without change of the applicable laws of prescription and cannot be regarded as a vested right protected by the Constitution."[9]

The *Nebo* Court concluded with the following broad statement:

> Act 315 of 1940 provides that when lands are conveyed to the United States subject to a prior sale or reservation oil, gas, or other minerals still in force and effect, the rights so reserved or previously sold shall be imprescriptible. It does not state or imply that the reserved rights shall be increased or varied but only that they shall not be lost by prescription. The consideration of $1.75 per acre paid by the United States did not cover the value of any mineral rights. Indeed, since the mineral underlying the lands had previously been sold to Good Pine Oil without limit for time of their enjoyment, Bodcaw did not own any minerals which it could sell to the United States. Neither could it reserve nor sell the expectation of a servitude lapsed for

8. *Id.*

9. *Id.* at 1009. The Court also found that Act 315 of 1940 did not run afoul of the Contract Clause of the U.S. Constitution. *Id.*

> nonuser [sic]. . . . All that Bodcaw had which it could sell to the United States was the timber land itself. That was the obligation of the contract and it remains unimpaired. By virtue of its ownership of the land appellant could merely hope that the outstanding mineral servitude might lapse but this hope or expectancy was born or a statute of prescription based on the then existing public policy of the State as declared by its legislature. It was not a part of the obligation of the contract. It was wholly given by law and the power that gave it could increase, diminish, or otherwise alter, or wholly take it away without violating the Federal Constitution.
>
> Judgment affirmed.[10]

From November 1934, through January 1937, the United States acquired, pursuant to the Weeks Act,[11] approximately 180,000 acres of land located in Grant, Winn and Natchitoches Parishes from Bodcaw Lumber Company and Grant Timber & Manufacturing Company. This was accomplished through eleven different conveyances – nine deeds and two expropriation judgments (Def.'s Opp. Mot. Summ. J. ¶ B, Ex's. 1-11 [Doc. 133]. Prior to that, from November 1932, through

10. *Id.* at 1010.

11. 1911, 36 Stat. 961 (codified in various sections of Title 16 U.S.C.). This is the enabling legislation for the National Forest System.

May 1934, Good Pine Oil Company acquired the mineral rights to the 180,000 acres described above, pursuant to six mineral conveyances (*Id.*, Ex's. 12-17). At the time of the acquisitions, all of the lands acquired by the United States were clearly burdened by the six mineral servitudes running in favor of Good Pine Oil Company (*Id.*, ¶ B and Def.'s Resp. Pl.'s Stat. Uncontested Fact ¶ 5 [Doc. 134]). In 1948, when the United States filed suit for declaratory judgment, Nebo Oil Company was the successor in interest to all of the Good Pine Oil Company's then outstanding mineral rights. The United States does not dispute that the current plaintiffs, via various conveyances, are successors in interest to the mineral servitudes that had been previously owned by Good Pine Oil and later Nebo Oil Company (Def.'s Opp. Mot. Summ. J. ¶ B and Def 's Resp. Pl.'s Stat. Uncontested Fact ¶ 3).

Based on the *Nebo Oil* Fifth Circuit opinion and the stipulated facts, there can be no real dispute that: (i) At the time Act 315 of 1940 was enacted the United States owned the surface of the 180,000 acres at issue, which were burdened by mineral servitudes running in favor of Good Pine Oil Co.; (ii) In 1948, the United States sought a declaratory judgment against Nebo Oil Co. on 800 acres; (iii) The Fifth Circuit found that Act 315 of 1940 was applicable to the minerals underlying the 24,943.93 acre tract of land sold to the United States, of which the 800 acres was a part, and that those minerals were imprescriptible;[12] and (iv) plaintiffs are the current

12. *See* discussion and quotation of *Nebo Oil supra.*

successors in interest to whatever outstanding mineral rights Good Pine Oil Co. originally acquired.

In 1972, the Supreme Court decided *Little Lake Misere.*[13] *Little Lake* established that Act 315 of 1940 did not apply to mineral servitudes burdening lands acquired by the United States pursuant to the Federal Migratory Game Bird Act. The Court used federal choice of law principles (particularly the *Clearfield Trust*[14] Doctrine) in refusing to apply Act 315 of 1940.[15] Instead, the Court applied the residual prescription rule of ten years non-use.[16]

In 1991, forty years after *Nebo Oil*, and almost twenty years after *Little Lake*, the United States Bureau of Land Management apparently took notice of the *Little Lake* opinion and began leasing and/or attempting to lease portions of the 180,000 acres at issue, as to which plaintiff's claim ownership in perpetuity (Pl.'s Compl. ¶ 14, Ex. E [Doc. 1] and Def.'s Answer ¶ 14 [Doc. 17]). In February 2000, after many letters of protest and exchanges with the United States (Pl.'s Compl. ¶ 15 and Def.'s Answer ¶ 14), Petro-Hunt filed this Quiet Title action pursuant to 28 U.S.C. §§ 2201 and 2409, seeking to be declared the owners of the mineral servitudes in

13. 412 U.S. 580, 93 S. Ct. 2389 (1973).

14. 318 U.S. 363, 63 S. Ct. 573 (1943).

15. 412 U.S. at 591-94.

16. 412 U.S. at 604.

perpetuity and declaring the leases granted by the United States a nullity (Pl.'s Compl. ¶ 18).

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A fact is "material" if it may affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). An issue is "genuine" if there is sufficient evidence so that a reasonable jury could return a verdict for either party. *Id.*

The moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, and/or affidavits which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986); *Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309 (5th Cir. 1999). The moving party is not required to negate the elements of the non-moving party's case. *Lawrence*, 163 F.3d at 311. However, where the moving party bears the burden of proof on an issue, it must produce evidence that would, if uncontroverted at trial, warrant a judgment as a matter of law. *Int'l Short*

Stop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th Cir. 1991).

Once the moving party carries its initial burden, the burden then falls upon the non-moving party to demonstrate the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-88, 106 S.Ct. 1348, 1355-56 (1986). The non-moving party "must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (citations omitted). This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory or unsubstantiated allegations, or by a mere scintilla of evidence. *Little v. Liquid Air. Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted). In the absence of any proof, the court will not assume the non-moving party could or would prove the necessary facts. *Id.*

Pursuant to Local Rule 56.1, the moving party shall file a Statement of Uncontested Facts as to which it contends there is no genuine issue to be tried. Local Rule 56.2W requires that a party opposing the motion for summary judgment set forth a "short and concise statement of the material facts as to which there exists a genuine issue to be tried." All material facts set forth in the statement required to be served by the moving party "will be deemed admitted, for the purposes of the motion, unless specifically denied." Local Rule 56.2W.

Appendix E

LAW AND ANALYSIS

A. Framing this case properly for purposes of *res judicata* analysis.

1. Numerosity of servitudes addressed.

The United States suggests that the 800 acre servitude involved in Nebo Oil is "one of 96 servitudes that, at one time, burdened the approximately 180,000 acres at issue in this case. . . . [and that] [e]ach mineral servitude involves a separate nucleus of operative fact." They further state that the "96 servitudes have different drilling and production histories." (Def. 's Opp. Mot. Sum. J. pp. 15-16 [Doc. 133]).[17] This Court does not believe that 96 separate or mini-trials are necessary for the resolution of the issue of *res judicata.* None of the servitudes had been outstanding for longer than 8 years upon the enactment of Act 315 of 1940. Therefore, this Court could not address prescription issues if *Nebo Oil,* and more specifically Act 315 of 1940, were to have preclusive effect between these parties, as none of the mineral servitudes would have ever prescribed.

2. Ripeness addressed.

The United States also raises the issue of ripeness. In the end, like prescription, it is of no import if *res*

17. The United States apparently arrived at this figure by looking at the number of mineral conveyances, number of acquisition deeds, contiguous acreage estimations and various drilling and production data.

judicata is to apply. There was no reason for the United States to wait ten years to litigate title to property whose owners claimed it would never prescribe. The issue of the application of Act 315 of 1940 was actually litigated to a conclusion. Hypothetically, if Act 315 of 1940 had been held inapplicable or unconstitutional in *Nebo Oil,* it is extraordinary to imagine that either party would have thereafter though that Act 315 of 1940 applied to any of the other factually similarly mineral servitudes. In such an event, Nebo Oil Co. would have understood that its other outstanding mineral servitudes were subject to the default rule of ten year prescription of non-use. The converse is also true and the actions of the parties for forty years after the *Nebo Oil* opinion demonstrate such.

3. Contractual language – the conveyances giving rise to the mineral servitudes and mineral reservations are similar and not subject to varying interpretation.

The operative language in all six mineral servitudes is virtually identical and all six would have been consistently interpreted under the pre-Mineral Code law – as giving rise to an ordinary mineral servitude, which was subject to prescription for ten years non-use.[18] There

18. *See* the oft-cited case *Frost-Johnson Lumber Co. v. Sailing's Heirs,* 150 La. 756, 91 So. 207 (La. 1922) and its progeny, for the creation and recognition of the mineral servitude. Under clear jurisprudence at the time, the mineral servitude was (and still is) a fixed beacon, unique to Louisiana law. Persons have in

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is nothing remarkable about the language creating these particular mineral servitudes. In regards to prescription, one of the only meaningful things the parties could have done (if not also surface owners), would have been to stipulate a shorter prescriptive period than the applicable ten years. This, nor anything apart from the default rules was intended.

Turning to the mineral reservations in the conveyances to the United States (not the mineral servitudes discussed above), the government attempts to create a title quandry — "four of the deeds and one judgment, including the February 11, 1936 deed involved in Nebo Oil, created reversionary interests in the vendor if the servitudes held by Good Pine Oil prescribed, while the remaining conveyances contained no such provision." (Def. Opp. Mot. Summ. J. pg. 13 [Doc. 133]). This factual segue by the government is misleading. The attorneys who drafted such mineral reservations undoubtedly understood that Louisiana mineral law does not support reversionary interests and were also undoubtedly attempting, as with any zealous advocate, to reserve their rights to the full extent of the law.[19] This Court

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vain attempted to circumvent and impose permanent dismemberments of title (which is allowed in Texas and many other states), but this is only achievable in Louisiana by legislative fiat, such as in Act 315 of 1940.

19. As found by the Court of Appeals in *Nebo Oil*, "Prior to the year 1936 the United States was interested in purchasing
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examined the language referenced by the United States and finds nothing remarkable. The different clauses simply represent an elaboration of basic principles of mineral law, *e.g.*, what it takes to interrupt prescription. In other words, these were just two different versions of "plain-vanilla," boilerplate, mineral reservation language.

This Court finds that all of the mineral servitudes and reservations would be given the same effect under Louisiana law. None of the clauses utilized are so substantially different that they would give rise to some interpretation and application inconsistent with the

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lands in Louisiana for national forest purposes and had found that owners of large tracts of land were unwilling to sell their lands because of court decisions holding that the sale or reservation of mineral rights in Louisiana created only a right in the nature of a servitude which was subject to prescription by ten years nonuser [sic]. However, the United States Department of Agriculture, Forest Service, was not in accord with this view and on May 29, 1935, submitted to Bodcaw Lumber Company an opinion of the Assistant Solicitor of the Department of Agriculture to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes." What would have created factual dissimilarities in these mineral reservations is if the drafters of these documents had included language about the aforementioned opinion of the Department of Agriculture. Including such language under the impression, albeit now a mistaken one, that the United States government was guaranteeing permanent severability of the minerals, would have lent itself to further examination and would have warranted the United States' invocation of alleged factual differences.

default rules for mineral servitudes or with the mineral servitude and reservation at issue in *Nebo Oil.*

4. The issue of the applicability of Act 315 of 1940 has been litigated.

Through its actions, the United States has demonstrated that it no longer feels that the *Nebo Oil* judgment holds sway, even between parties in privity. This Court is addressing *res judicata.* Had the United States sought to litigate other mineral servitudes, underlying other parcels of land not related to the *Nebo Oil* litigation, the mineral servitude owners would not have cried preclusion or *res judicata,* they would have merely pointed to the fact that the case law was in their favor. In fact, this did occur in Cameron Parish in 1972 on lands acquired under the Federal Migratory Game Bird Act. Unsurprisingly, defendants in that litigation pointed to *Nebo Oil,* but this time the Court found Act 315 of 1940 was not applicable to then outstanding mineral interests and held that the default rule of prescription by ten years non-use applied.[20]

New decisional law was made, and now, some forty years later, the United States is using the *Little Lake Misere* case as a buffer for what it undoubtedly could not have done prior to *Little Lake Misere.* This two step approach does not short circuit the application of *res judicata,* especially in the realm of real property. The United States is relying on a change of law to undo a

20. *See* discussion of *Little Lake Misere* on pg. 7, *supra.*

prior case — not merely attack the holding or decline to follow it in future litigation, but actually attempting to undo its effects, as between the parties. That is not to say that the United States has to continue to apply the holding of *Nebo Oil* in current mineral servitude disputes, merely that it cannot undo the effects of that judgment between it and the privies of Nebo Oil Co.

5. This judgment specifically addresses res judicata / claim preclusion — all other arguments / contentions are moot.

This Court restates that it does not need to delve into such matters as what constitutes continguous tracts, the number of servitudes, and whether prescription of nonuse was interrupted by good faith operations for the discovery and production of minerals. All such considerations are rendered moot by the Court's finding that *res judicata* is applicable to the entirety of this case.[21]

Unlike an analysis of prescription, contiguous acreage, or good faith drilling operations, this Court is faced with what may be viewed as a primarily legal question. The basic facts as to the location of the property in dispute and who are the ancestors in title to Nebo Oil Co. are not in dispute. What is in dispute is the preclusive effect of the *Nebo Oil* decision. Therefore, this issue is particularly ripe for disposition by summary judgment.

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21. *See supra* note 5.

B. Res Judicata takes on increased importance in the realm of real property.

The doctrine of claim preclusion embodies a "fundamental precept of common-law adjudication," which holds that a claim or issue which parties had a full and fair opportunity to litigate should, after judgment, forever be put to rest as between those parties.[22] Likewise, the public's interest in the reliability and certainty of titles to real property is substantial and requires efficient and decisive resolution. Therefore, in matters pertaining to real property, these two interests combine to encourage strict application of the claim preclusion doctrine. This Court could not have improved on the words of the Supreme Court in *Minnesota Mining Co. v. National Co.*:[23]

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change.

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22. *Montana v United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979). A non-exclusive list of policies supporting claim preclusion are (i) to promote fairness; (ii) to prevent inconsistent judgments and to achieve uniformity and certainty; (iii) to finalize disputes among the parties; and (iv) to conserve judicial resources. Jay Carlisle, "Second Circuit 1999-2000 Res Judicata Developments," 20 BLR 75, 77 (Summer 2000).

23. 70 U.S. 332, 334, 18 L.Ed. 42 (1865).

> Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of states affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.[24]

Nevada v. United States[25] is a roughly similar case to the one at bar. In *Nevada*, the Court found that *res judicata* applied, thereby preventing the United States from re-litigating issues resolved in a court approved settlement agreement involving rights to water from the Truckee River. In *Nevada*, the original settlement judgment was entered in 1944, and 29 years later the government instituted another challenge seeking additional water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation. The Court found that all water rights from the Truckee River had been previously and conclusively decided. The Court noted that the "policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water . . . ."[26]

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24. *Id.* (*quoted* in *Nevada v. United States*, 463 U.S. 108, 129, n. 10, 103 S.Ct. 2906, 2918, n. 10 (1983)).

25. 463 U.S. 108, 103 S.Ct. 2906 (1983).

26. *Id.* 463 U.S. at 129, n. 10, 103 S.Ct. at 2918, n. 10.

C. Legal standard applicable to *res judicata* or claim preclusion.

This Court is presented with the issue of the preclusive effect of the *Nebo* Oil case on the current litigation. The classic formulation of the claim preclusion doctrine was set forth in *Cromwell v. County of Sac*:[27]

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

The Cromwell test has been little altered. The Fifth Circuit has applied a four-part test for determining when a claim will be barred as a result of a judgment in a prior action: (i) there must be a final judgment on the merits; (ii) the prior action must have involved the same parties or their privies; (iii) the prior action must have involved the same claim; (iv) the judgment in the prior action must have been rendered by a court of competent jurisdiction.[28] This court finds that all four elements are

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27. 94 U.S. 351, 352, 24 L. Ed. 195 (1876).

28. *See Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576, 586, *cert. granted* 118 S.Ct. 31, 521 U.S. 1152, *reversed* 118 (Cont'd)

met. Elements (i), (ii) and (iv) are not major points of contention in this litigation, although privity is briefly addressed in Part – D below. Element (iv) is where the greatest dispute lies and is addressed in Part – E below.

D. Plaintiff's share privity with Nebo Oil Co. for purposes of *res judicata*.

Privity, as one of the necessary elements for application of *res judicata*, is a rather amorphous, factual determination. Often it is utilized in a conclusory fashion – privity "is not a requirement we can satisfy through inquiry; rather the existence of 'privity' is the inquiry satisfied."[29] It has also been described rather cryptically as a "close enough relationship."[30] A relevant cite is found in *Latham v. Wells Fargo Bank, N.A.*:[31]

> '[P]arties' for the purposes of res judicata does not mean formal, paper parties only, but also

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S.Ct. 921, 522 U.S. 470, *on remand* 139 F.3d 512 (5th Cir. 1997); *Travelers Ins. Co. v. St. Jude Hosp. of Kenner*, 37 F.3d 193, 195 (5th Cir. 1994); and *Corporate Health Ins., Inc. v. Texas Dept. of Ins.*, 12 F.Supp.2d 597 (S.D. Tex. 1998).

29. *Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1174 (5th Cir. 1992).

30. *Bruszewski v. United States*, 181 F.2d 419, 423 (3rd Cir. 1950).

31. 896 F.2d 979 (5th Cir. 1990).

> includes 'parties in interest, that is, those persons *whose interests are properly placed before the court* by someone with standing to represent them are bound by matters determined in the proceeding.' . . . A non-party is in privity with a party for res judicata purposes . . . if he has succeeded to the party's interest in property. . . .[32]

The concept of privity is not disputed or really addressed by the United States. The government admits that plaintiffs in this case are ancestors in title to Nebo Oil's mineral rights. Therefore, for purposes of *res judicata*, this Court finds that plaintiff's "succeeded" to Nebo Oil Co.'s "interest in the property" and that there is privity between plaintiffs and Nebo Oil Co.

E. Scope of the claim preclusion doctrine – application to this case.

The most contentious aspect of this *res judicata* inquiry is determining the scope of the claim preclusion doctrine. In this case, that determination is whether the claim to the 180,000 acres is, for purposes of *res judicata*, the same claim which was or could have been asserted in the *Nebo Oil* litigation. The scope of *res judicata* preclusion has been enunciated in a variety of ways, *e.g.*, that it addresses all relevant issues,[33] or all claims that

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32. *Id.* at 983.

33. *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798, 116 S.Ct. 1761, 1765 (1976) ("[A] prior judgment is generally 'res

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could have been advanced,[34] or as a corollary to the affirmative pleading rules for compulsory counterclaims and affirmative defenses.[35] The basic idea is that, "Claim preclusion or *res judicata*, bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."[36]

It does not matter that the law applicable to Nebo Oil may have changed pursuant to the *Little Lake Misere*[37] opinion. It also does not matter whether the application of claim preclusion to a particular case will

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judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit.'" *(citation omitted))*.

34. *Goldberg v. R.J. Longo Constr. Co. Inc.*, 54 F.3d 243, 246 (5th Cir. 1995) (Res judicata bars "all claims that were or *could have been* advanced in support of the cause of action on the occasion of its former adjudication ... not merely those that were adjudicated. *(citations omitted))*.

35. *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." (*citations omitted*)).

36. *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999).

37. 412 U.S. 580, 93 S. Ct. 2389 (1973).

result in an unfair or harsh outcome.[38] As a general rule, a change in the statutory or case law will not alter the claim preclusion effect of a prior judgment – "the res judicata consequences of a final, unappealed judgment on the merits [is not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."[39]

In regards to what constitutes a claim, the Fifth Circuit accepts or at least endorses the "Same Transaction Test," found in § 24 of the Restatement (Second) of Judgments, which reads as follows:[40]

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or

38. *In re Teal*, 16 F.3d 619, 622 n.6 (5th Cir. 1994) (conclusion reached by court "comports with the well-known rule that a federal court may not abrogate principles or res judicata out of equitable concerns. . . . Indeed, it must give res judicata effect to a prior judgment even if it would be voidable on appeal because of legal error" (*citations omitted*)).

39. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428 (1981) *(citations omitted)*.

40. *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999); *Goldberg v. R.J. Longo Constr. Co.*, 54 F.3d 243, 246 (5th Cir. 1995).

> series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a 'transaction,' and what groupings constitute a 'series' are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

The government is not free to select a particular 800 acres, litigate over that, lose, and then re-litigate other parcels of land which are similarly situated. This practice runs afoul of the prudent observation in *United States v. Stauffer Chemical Co.*, that a party may not "litigate twice with the same party an issue arising in both cases from virtually identical facts."[41] At the time *Nebo Oil* was brought (1948), the United States was well aware of the marked shift in federal civil procedure which was ushered in with the Federal Rules of Civil Procedure in 1938. With the elimination of the distinction between law and equity, the advent of notice pleading, liberal joinder and amendment, and broad discovery rights, parties had ample opportunity to present all of their related claims and defenses in the same action.

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41. 464 U.S. 165, 172, 104 S.Ct. 575, 579 (1984).

"The United States concedes that the ownership of the mineral rights underlying the 800 acres involved in *Nebo Oil* was decided and cannot be revisited here." (Def.'s Opp. Mot. Summ. J., pg. 11 [Doc. 133]). This Court also finds that the Fifth Circuit applied Act 315 of 1940 to the mineral reservation and sale of the 24,943.93 acre tract to the United States, of which the 800 acres was a part. Accordingly, those minerals underlying the 24,943.93 acre tract were previously held imprescriptible and *res judicata* clearly applies.

As previously discussed, this Court finds that the five other servitudes and the later mineral reservations burdening the 180,000 acres are virtually identical to the servitude and reservation at issue in *Nebo Oil*.[42] None of the servitudes had been outstanding for longer than eight (8) years upon the enactment of Act 315 of 1940. Therefore, all of the servitudes were equally situated and susceptible to the application of Act 315. In addition, all of the surface of the disputed acreage was acquired by the United States pursuant to the Weeks Act and none of the language in such deeds or mineral reservations would have warranted a different legal conclusion at the time of *Nebo Oil*. Accordingly, this Court finds that the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil*.

42. *See* analysis in Part A-3, *supra*, for the proposition that none of the clauses utilized are so substantially different that they would give rise to some interpretation and application inconsistent with the default rules for mineral servitudes or with the servitude at issue in *Nebo Oil*.

Appendix E

From an examination of *Nebo Oil,* it is obvious that had the government elected, as plaintiff in *Nebo Oil,* to include all similarly situated acreage in that suit, it would not have changed the decision of that Court. The government has had a "full and fair opportunity" to litigate the application and constitutionality of Louisiana Act 315 of 1940 to this mineral property. The government should not be allowed to litigate now that which it could have litigated 50 years ago. *Res judicata* now bars the United States from re-litigating these issues.

CONCLUSION

For the foregoing reasons, this Court finds that Plaintiff's Motion for Summary Judgement [Doc. 85] must be granted. A formal judgment, prepared by plaintiffs and approved as to form by the United States, will be signed upon presentation.

THUS DONE AND SIGNED, in Shreveport, Louisiana, on this 17th day of December, 2001.

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 30, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-30095

PETRO-HUNT LLC; HUNT PETROLEUM CORP; KINGFISHER RESOURCES INC

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA; ASPECT RESOURCES LLC; BAYOU PETROLEUM CO; FIRST TEXAS HYDROCARBONS INC; OSCAR C FORLAND; GULF COAST OIL & GAS CO; JUSTISS OIL COMPANY INC; M B EXPLORATION LLC; NORTHSTAR ENERGY LLC; PALMER PETROLEUM INC; HOWELL R SPEAR; JOHN P STRANG; OCEAN ENERGY RESOURCES INC formerly known as, UMC Petroleum Corp; WHELESS T D L EXPLORATION COMPANY LLC; DEVON SFS OPERATING INC formerly known as, Santa Fe Snyder Corp; J BRADLEY JEFFREYS; ENERGY ARROW EXPLORATION LLC

Defendants - Appellees

Appendix F

Appeal from the United States District Court for the Western District of Louisiana, Shreveport

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion March 6, 2007, 5 Cir., ____, ____ F.3d ____)

Before SMITH, BARKSDALE, and DENNIS, Circuit Judges

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

s/ James Dennis
United States Circuit Judge

APPENDIX G — RELEVANT AUTHORITIES

Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

Amendment XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix G

Act 315 of 1940

Providing that when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, form any person, firm or corporation, and the act of acquisition, verdict or judgment contains a reservation of oil, gas and/or other minerals or royalties, or provides that said land passes subject to a prior sale or reservation of oil gas and/or other minerals or royalties, still extant, said rights so reserved or previously sold shall be imprescriptable; and repealing Acts 68 and 151 of 1938 and other laws, general or special, inconsistent herewith.

"Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivision or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptable.

"Section 2. That Act 68 and Act 151 of 1938 and all other laws or parts of laws, general or special, in conflict herewith are hereby repealed."

Appendix G

§ 149. Mineral rights reserved from acquisitions of land by governments or agencies thereof imprescriptible

A. "Acquiring authority" for the purposes of this Section means (1) the United States, the state of Louisiana, and a subdivision, department or agency of either the United States or the state of Louisiana; . . . that is certified by the secretary of the Department of Natural Resources to be a state or national land conservation organization. The certification shall be in writing and shall be a public record. Such certification shall not for that reason alone be construed to authorize the nonprofit entity to exercise expropriation powers. With respect to certifications occurring on and after August 1, 2004, an entity's certification shall require approval by official action of both the Senate Committee on Natural Resources and the House Committee on Natural Resources.

B. When land is acquired from any person by an acquiring authority through act of sale, exchange, donation, or other contract, or by condemnation or expropriation, and a mineral right subject to the prescription of nonuse is reserved in the instrument or judgment by which the land is acquired, prescription of the mineral right is interrupted as long as title to the land remains with the acquiring authority,

Appendix G

or any successor that is also an acquiring authority. . . . The instrument or judgment shall reflect the intent to reserve or exclude the mineral rights from the acquisition and their imprescriptibility as authorized under the provisions of this Section and shall be recorded in the conveyance records of the parish in which the land is located.

FILED
JAN 2 8 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-563

In the Supreme Court of the United States

PETRO-HUNT, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that its previous decision in this case had established that petitioners' mineral rights would revert to the United States if they lay unused for 10 years.

2. Whether the court of appeals correctly adhered to the "law of the case" doctrine because no manifest injustice justified departing from that rule.

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In the Supreme Court of the United States

No. 07-563

PETRO-HUNT, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported. An earlier opinion of the court of appeals (Pet. App. 14a-43a) is reported at 365 F.3d 385. The order and judgment of the district court (Pet. App. 8a-13a) are unreported. An earlier opinion of the district court (Pet. App. 44a-73a) is reported at 179 F. Supp. 2d 669.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2007. A petition for rehearing was denied on July 30, 2007 (Pet. App. 74a-75a). The petition for a writ of certiorari was filed on October 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners brought this quiet title action to obtain a declaration that they are the owners, in perpetuity, of mineral rights in approximately 180,000 acres of federal land within the Kisatchie National Forest in Louisiana. The district court granted petitioners summary judgment based on what it found to be the preclusive effect of a 1951 federal judgment. Pet. App. 44a-73a. The court of appeals reversed, holding that petitioners' claims to the mineral servitudes could be barred by prescription. The court remanded for a determination as to which servitudes had prescribed. *Id.* at 14a-43a. This Court denied a writ of certiorari. 543 U.S. 1034 (2004) (No. 04-190). On remand, the district court held that petitioners still owned five servitudes (representing approximately 109,844.5 acres), but that the remainder had prescribed. Pet. App. 11a-13a. The court of appeals affirmed. *Id.* at 1a-7a.

1. Under Louisiana law, the mineral rights on real property cannot be owned as an estate separate from the land, but only as a right of servitude to enter the land and extract the minerals. La. Rev. Stat. Ann. § 31:21 (West 2000); *Frost-Johnson Lumber Co.* v. *Salling's Heirs*, 91 So. 207, 243-245 (La. 1920). Such mineral servitudes ordinarily prescribe (*i.e.*, revert to the landowner) if not used for a period of ten years. La. Rev. Stat. Ann. § 31:27(1) (West 2000); *Frost-Johnson Lumber Co.*, 91 So. at 243-245. The period of prescription for a servitude begins to run on the date the servitude is created, see La. Rev. Stat. Ann. § 31:28 (West 2000); *Ober* v. *Williams*, 35 So. 2d 219, 224 (La. 1948), and is interrupted only by "good faith operations" for the "discovery and production of minerals" under that servitude, La. Rev. Stat. Ann. § 31:29 (West 2000).

2. Petitioners claim the mineral rights at issue in this case as successors in interest to the Nebo Oil Company, which in turn was successor in interest to the Good Pine Oil Company. Pet. App. 23a, 30a. Five Louisiana timber companies formed Good Pine Oil in 1932 and conveyed to the new company all interests in oil, gas, and sulphur on their respective lands, to facilitate mineral exploration and production. *Id.* at 18a. This case involves servitudes originally conveyed by two of the five companies, Bodcaw Lumber and Grant Timber, through six separate grants. *Ibid.* Each of the six conveyances created multiple servitudes, because each involved mineral rights on several parcels of land, many of them noncontiguous. *Ibid.* Each of the six deeds conveying mineral rights to Good Pine Oil contained a clause contemplating that a ten-year prescriptive period would apply. *Id.* at 18a-19a.

Between November 1934 and January 1937, the United States acquired approximately 180,000 acres of land from Bodcaw Lumber and Grant Timber, in multiple distinct parcels, through nine sales and two judgments of condemnation. Pet. App. 19a. The United States acquired the lands for the Kisatchie National Forest, pursuant to the Weeks Law, ch. 186, 36 Stat. 961. Pet. App. 19a. Portions of the property acquired were burdened by 96 separate mineral servitudes in favor of Good Pine Oil (the Good Pine servitudes). *Ibid.*

All but one of the 11 instruments of transfer stated that the conveyances were "subject to" one or more of the mineral deeds in favor of Good Pine Oil. Pet. App. 20a. Most of the instruments further stated that the "mention" of the mineral reservation was "solely for the purpose of limiting vendor's warranty * * * and *the recital of said Mineral Sale shall in nowise extend or en-*

large the same in point of time." *Ibid.* Five of the 11 instruments also contained additional mineral reservations in the name of Bodcaw Lumber or Grant Timber, which were to become effective upon the prescription of the servitudes held by Good Pine Oil. *Ibid.* Each of those five instruments stated that at the termination of the additional reservations, the United States would hold the land in "complete fee." *Ibid.*

3. In 1940, after the United States had acquired the property, the Louisiana legislature enacted a law changing the treatment of mineral rights on federal property. Act No. 315 (Act 315), 1940 La. Acts 1249 (Pet App. 77a). Act 315 provided that when land acquired by the United States is subject to a mineral servitude, that servitude is "imprescriptible," *i.e.*, will remain the beneficiary's in perpetuity even if not used. Act 315 § 1, 1940 La. Acts 1250. The Act was intended to facilitate the United States' acquisition of land, by permitting landowners to reserve mineral rights without the risk of losing those rights through prescription, and to allow Louisiana to continue to tax and regulate those mineral rights by preventing ownership from reverting to the United States. See *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 599-600 & n.18 (1973) (*Little Lake Misere*).

4. In 1948, the United States filed a declaratory judgment action against Nebo Oil to quiet title to a specific parcel of land, approximately 800 acres in size, on which Nebo Oil claimed a mineral servitude as successor in interest to Good Pine Oil and was threatening to begin drilling. Pet. App. 23a. The United States had purchased that parcel and several others (totaling 24,943.93 acres) from Bodcaw Lumber in one of the 11 acquisitions discussed above. *Ibid.* The servitude claimed by Nebo Oil had not been used for more than ten years, and the

United States contended that it had prescribed. *Ibid.* The United States sought an order permanently enjoining the company from entering the 800-acre parcel for mineral production. *Ibid.*

The district court denied the United States relief, holding that Act 315 had rendered the servitude "imprescriptible" and rejecting the government's arguments that Act 315 was unconstitutional as applied to servitudes on federal land that were created prior to Act 315's enactment. *United States* v. *Nebo Oil Co.*, 90 F. Supp. 73, 84-97 (W.D. La. 1950). The court of appeals affirmed. *United States* v. *Nebo Oil Co.*, 190 F.2d 1003, 1008-1010 (5th Cir. 1951) (*Nebo Oil*). The government had argued that Act 315's elimination of the rule of prescription for servitudes on federal land violated the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, the Contract Clause, Art. I, § 10, Cl. 1, and the Due Process Clause of the Fourteenth Amendment. The court of appeals held that the United States' "reversionary interest" in the minerals—*i.e.*, the interest in reclaiming mineral rights through prescription—was not "vested" under Louisiana law. 190 F.3d at 1008-1010. In granting final judgment, the district court decreed that the "oil, gas, and sulphur in, on and under the *lands described in the complaint* are vested in perpetuity in Nebo Oil Company, Inc., its successors and assigns." Pet. App. 24a n.23 (emphasis added).

5. This Court subsequently held in *Little Lake Misere* that federal common law, not Act 315, governs the prescription of servitudes on property acquired by the United States pursuant to a federal statute. In that case, the United States had acquired two parcels in Louisiana pursuant to the Migratory Bird Conservation Act (MBCA), 16 U.S.C. 715 *et seq.*, but Little Lake Misere

Land Co. retained mineral servitudes. *Little Lake Misere*, 412 U.S. at 582-583. The servitudes were to "terminate" if not used for a ten-year period, and then "complete fee title to said lands [would] become vested in the United States." *Id.* at 583. The Louisiana legislature subsequently enacted Act 315, and Little Lake Misere contended that the new statute made its servitudes imprescriptible. *Id.* at 584. This Court disagreed. First, it held that federal land acquisitions pursuant to the MBCA are governed by federal common law, not state law. *Id.* at 592-594. Second, although federal common law often borrows state law as the rule of decision, the Court held that Act 315 could not be borrowed with respect to federal acquisitions before its enactment, because doing so would deprive the United States of "bargained-for contractual interests" and therefore be "plainly hostile to the interests of the United States." *Id.* at 594-595, 597. The rule of decision was instead to be supplied instead either by federal common law or by "residual" state law (*i.e.*, Louisiana law without Act 315), either of which would give effect to the contractual 10-year prescriptive period. *Id.* at 604.

The Fifth Circuit has followed *Little Lake Misere* and held that land acquisitions under the Weeks Law are to be treated the same way as acquisitions under the MBTA. *Central Pines Land Co.* v. *United States*, 274 F.3d 881 (2001), cert. denied, 537 U.S. 822 (2002) (*Central Pines*). In *Central Pines*, as in this case and in *Nebo Oil*, the United States acquired land under the Weeks Law for the Kisatchie National Forest, subject to preexisting private servitudes, and prior to enactment of Act 315. *Id.* at 885. The Fifth Circuit held that the subsequent enactment of Act 315 could not affect those preexisting servitudes; that the ten-year prescriptive period

of "residual (pre-Act 315) Louisiana law" should govern; and that the servitudes on the Kisatchie Forest lands had prescribed for non-use. *Id.* at 888-892.

6. a. In February 2000, petitioners sued for a declaration that they are owners in perpetuity of the 96 Good Pine servitudes and that any mineral leases or offers to lease issued by the United States on the subject properties are null and void. Pet. App. 30a. The government conceded that the particular servitude that had been at issue in *Nebo Oil* was governed by the judgment in that case. *Id.* at 36a n.58. But the government argued that the remaining 95 servitudes were subject to the ordinary rule of prescription and that many had prescribed for non-use. See *id.* at 30a-31a & n.49. Petitioners sought summary judgment, arguing that the res judicata effect of *Nebo Oil* precluded the government's reliance on prescription, and in the alternative that several of the servitudes had been continuously used and had not prescribed. *Id.* at 31a-32a & n.49.

The district court granted petitioners summary judgment on the ground of res judicata. Pet. App. 44a-73a. The court held that *Nebo Oil* precluded the government from disputing the applicability of Act 315 to *any* of the servitudes at issue here. In the district court's view, the *Nebo Oil* decision had applied Act 315 not just to the 800-acre parcel named in the complaint in that case, but to the entire "24,943.93 acre tract" sold to the United States by Bodcaw Lumber, "of which the 800 acres was a part." *Id.* at 72a. As for the ten other land transfers not even partially addressed in *Nebo Oil*, the district court concluded that "the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil*," that the government had a "full and fair opportunity" to "litigate the application and constitutionality of Louisiana

Act 315 to this mineral property," and that "[t]he government should not be allowed to litigate now that which it could have litigated 50 years ago." *Id.* at 72a-73a.

b. The court of appeals reversed. Pet. App. 14a-43a. The court first held that res judicata (claim preclusion) did not bar the United States from asserting that the 95 servitudes not at issue in *Nebo Oil* were now prescribed. Application of res judicata would be proper only if this case involves the "same claim" as *Nebo Oil*, *i.e.*, if the two actions are "'based on the *same nucleus of operative facts*.'" Pet. App. 34a-35a (quoting *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir.), cert. denied, 527 U.S. 1004 (1999)). The court held that petitioners could not meet that standard. The government had brought the previous quiet title action because of Nebo Oil's threat to its rights in the particular 800-acre parcel alone. "[E]ach of the Good Pine servitudes was a distinct real [property] right under Louisiana law," and the United States' "claim with respect to each servitude depends on a unique set of operative facts." *Id.* at 38a. Therefore, "the operative facts" of *Nebo Oil* included only those necessary to prove the existence and "ten years' nonuse *of that particular servitude*," not facts relating to the other Good Pine servitudes. *Ibid.* Although the facts relating to the prescription of each servitude might well be *similar*, true res judicata requires not just factual similarities, but a "sameness of operative facts." *Id.* at 37a. Because the rights to each servitude turned on distinct operative facts, res judicata did not bar claims concerning the 95 other servitudes.

The court of appeals observed that factual similarities that give rise to a common legal issue are more appropriately considered under the heading of collateral estoppel (issue preclusion). Pet. App. 37a. Turning to

that issue, the court held that collateral estoppel did not preclude the government from disputing Act 315's applicability, for two reasons. First, collateral estoppel applies only when an issue "actually litigated" in the first case is "identical" to an issue in the second case. *Id.* at 39a. The court determined that "*Nebo Oil* did not address" the "threshold choice-of-law issue" identified in *Little Lake Misere*, but had simply "assumed the applicability" of state law, including Act 315. *Id.* at 41a. Therefore, the applicability of federal common law was not "actually litigated" in *Nebo Oil*. *Id.* at 42a. Second, collateral estoppel governs resolution of a legal question "only when there has been no 'change in controlling legal principles'" since the earlier decision. *Id.* at 39a (quoting *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1167 (5th Cir. 1981)). Here, "even if the choice-of-law issue had been raised in *Nebo Oil*," the subsequent decisions in *Little Lake Misere* and *Central Pines* would have sufficiently changed the governing law that collateral estoppel could not apply in any event. *Id.* at 42a-43a.

In light of the latter ruling, the court of appeals recognized that *Little Lake Misere* and *Central Pines* were controlling here, and that Act 315 could not bar the government from asserting the defense of prescription with respect to servitudes created before its enactment. Pet. App. 43a. Under the federal common law rule, the government was entitled to prevail on the defense of prescription as to any servitude that had lain unused for ten years. *Ibid.* Recognizing that petitioners had also sought summary judgment on the alternative ground that the servitudes had not prescribed, the court remanded for the district court to make that determination. *Ibid.*; see *id.* at 31a n.49.

c. Petitioners filed a petition for a writ of certiorari, which this Court denied. 543 U.S. 1034 (2004) (No. 04-190).

d. On remand, petitioners filed a "motion for trial" to determine "whether Act 315 of 1940 can be constitutionally applied [on] the facts of this case," which petitioners described as "essentially the facts in [*Nebo Oil*]." Mem. in Supp. of Mot. for Trial 1. Petitioners asserted that the Fifth Circuit had not actually decided the choice-of-law question and urged the district court to set that issue for trial. *Id.* at 1, 2, 7, 8. The district court denied petitioners' motion, stating that the "only issue" the court of appeals had left open on remand was "which of the '95 servitudes that were not at issue in *Nebo Oil*' ha[d] in fact prescribed for nonuse." Pet. App. 8a (quoting Pet. App. 43a).

The parties then stipulated that five servitudes—representing approximately 109,844.5 acres, out of the 180,000 acres of federal land at issue—had been in use and had not prescribed. Pet. App. 4a. The parties agreed that the remaining servitudes had prescribed. *Ibid.* The district court entered a judgment for petitioners in accordance with that stipulation. *Id.* at 10a-13a.

e. The court of appeals affirmed. Pet. App. 1a-7a. The court rejected petitioners' argument that its earlier choice-of-law ruling had been dictum; rather, the ruling was a "deliberate, considered statement" on a legal issue, as to which the facts were not in dispute. *Id.* at 4a-6a. The court also declined petitioners' request to depart from the law of the case and revisit the issues of res judicata and collateral estoppel, because petitioners had not shown "such manifest injustice as to warrant [an] exception" to the law-of-the-case doctrine. *Id.* at 6a.

ARGUMENT

The court of appeals properly reaffirmed its earlier holding that neither res judicata nor collateral estoppel distinguishes this case from the controlling decisions in *Little Lake Misere* and *Central Pines*. Neither the original decision nor the unpublished decision below in which the court of appeals adhered to the law of the case is in conflict with any other appellate decision. Indeed, petitioners affirmatively urge that this is a case whose "unusual facts" justify applying Act 315 retroactively despite the holdings of *Little Lake Misere* and *CentralPines*. Pet. 8. That contention does not meet this Court's criteria for review. The petition should therefore be denied.

1. Petitioners assert (Pet. 12-21) that the court of appeals violated due process by "substitut[ing] its own findings of fact for those of the District Court" on the res judicata issue, and by "granting judgment" without "giving [petitioners] a chance to be heard." Pet. 12. Each of these contentions lacks merit. The court of appeals' first opinion decided a question of law; the court did not overturn any findings, order a premature judgment, or deprive petitioners of a hearing. In the decision below, rendered after remand, the court of appeals properly adhered to its previous ruling.

a. The court of appeals' initial opinion did not turn on any factual finding or issue. Rather, the dispute concerned whether the servitudes burdening the 95 parcels not at issue in *Nebo Oil* were governed by Act 315 because of the res judicata or collateral estoppel effect of the *Nebo Oil* judgment. The court of appeals resolved that dispute based on settled law and undisputed facts.

The district court had decided to apply preclusion because some of the 95 parcels were acquired in the same

deed as the *Nebo Oil* parcel, and because it thought the remaining parcels were "similarly situated." Pet. App. 72a. Petitioners contend (Pet. 15-16, 21) that those statements were factual findings entitled to deference on appeal. Those determinations, however, were made on summary judgment, not after a trial. And the court of appeals properly held that summary judgment was improper as a matter of law, because the facts on which the district court relied were legally irrelevant. Res judicata applies only when two actions share the same "nucleus of operative facts," Pet. App. 35a, and the court of appeals properly determined that the dispute in *Nebo Oil* was legally distinct from the subsequent dispute over the other 95 servitudes.

Thus, the district court may have been correct that, as petitioners assert, the United States acquired some of the other parcels in the "same deed" or "same transaction" as the 800-acre parcel in *Nebo Oil*. Pet. 15. But the court of appeals was correct that as a matter of law, each of the many parcels contained in the single instrument of conveyance was subject to distinct servitudes. Indeed, under Louisiana law, "a landowner cannot create a single servitude * * * on two or more non-contiguous tracts." *Cox* v. *Sanders*, 421 So. 2d 869, 873 (La. 1982) (citation omitted). "[I]f this is attempted by a single instrument, there are nevertheless as many servitudes * * * as there are non-contiguous tracts of land." *Ibid.* (citation omitted). The purported factual finding on which petitioners rely therefore was beside the point. See also pp. 16-19, *infra* (refuting petitioners' renewed challenge to the court of appeals' res judicata analysis).

b. There is also no merit to the argument (Pet. 16-21) that the court of appeals denied petitioners a mean-

ingful opportunity to address the applicability of Act 315, or that petitioners should have been granted a "trial on the merits" of that question. Pet. 21. The United States invoked federal common law in its opening brief on the first appeal, explaining why collateral estoppel could not apply because this Court has since rejected the retroactive application of Act 315 to federal land acquisitions. 02-30760 Gov't C.A. Br. 44-50. Petitioners responded that as to the facts of the particular acquisitions at issue in *Nebo Oil* and in this case, "there has actually been no change in the law," and that an acquisition on those facts was not controlled by *Little Lake Misere* and *Central Pines*. 02-30760 Pet. C.A. Br. 36. The court of appeals proceeded to address the choice-of-law issue, in a statement that the subsequent panel determined to be "deliberate" and "considered," with the full force of a holding. Pet. App. 5a.

Petitioners argue that they should be given a chance to demonstrate that retroactive application of Act 315 would not be "hostile" to federal property interests in the present case and that Act 315 therefore may be applied as the rule of decision, despite the holdings of *Little Lake Misere* and *Central Pines*. Pet. 15-16, 21. But the facts on which petitioners premise this argument are the facts found in *Nebo Oil*. Petitioners never sought an opportunity to develop the record further; on remand, they argued that "the facts of this case * * * are essentially the facts in [*Nebo Oil*]" and that these facts distinguish this case from the controlling precedents. Mem. in Supp. of Mot. for Trial 1. The court of appeals thus has held that federal common law bars the application of Act 315 on these facts, and neither the prior petition for a writ of certiorari nor the instant one has raised

the validity of petitioners' supposed factual distinction as a basis for review.

Given the court of appeals' legal conclusion, the cases petitioner cites in support of remanding for further fact-finding are irrelevant. In both *Fountain* v. *Filson*, 336 U.S. 681 (1949) (per curiam), and *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963), this Court determined that there were disputed issues of fact that needed to be resolved before appellate review. See *Fountain*, 336 U.S. at 683; *Florida Lime & Avocado Growers*, 373 U.S. at 155-156. In this case, by contrast, the court of appeals held that Act 315 was inapplicable and, therefore, that any dispute over whether the facts found in *Nebo Oil* could also be found here was legally irrelevant to the choice-of-law question. (To be sure, there *was* a factual issue concerning which servitudes had prescribed; the court of appeals properly remanded for that determination.)

c. Petitioners' arguments for distinguishing *Little Lake Misere* and *Central Pines* are unavailing in any event.[1] Petitioners assert (1) that their "predecessors in title were promised by the government that if the surface of the land was sold to the government, the rules of prescription of mineral servitudes would not apply as a matter of federal law," Pet. 17 (citing *Nebo Oil*, 90 F. Supp. at 79, 82), and (2) that "the government did not intend to buy, and did not pay for the minerals" when acquiring the relevant land, *ibid.* (citing *Nebo Oil*, 90

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[1] Contrary to petitioners' suggestion (Pet. 20), this Court did not "distinguish" the facts of *Nebo Oil* in *Little Lake Misere*. Rather, this Court simply noted the findings on which the Fifth Circuit relied in *Nebo Oil*, in the course of describing the "first federal court test of Act 315" in a series of federal and state cases that led up to *Little Lake Misere*. 412 U.S. at 586 & n.4.

F. Supp. at 86-90). When the government acquired the land in question, the sellers (Bodcaw Lumber and Grant Timber) had already alienated their mineral interests. Accordingly, the assertion that the United States did not pay for or intend to buy the minerals is beside the point: the United States could not purchase minerals from parties that did not own the mineral rights. Nor did the United States separately purchase or condemn the mineral servitudes. Rather, the United States acquired the sellers' *future* interest in recovering those rights, should the servitude owner fail to exercise them during the prescriptive period. See *Central Pines*, 274 F.3d at 891-892 (holding that there is a federal interest in the rule of prescription, where the United States acquired an estate in fee, subject to an outstanding, prescriptible private mineral interest).

Nor is it significant whether, as petitioners allege (Pet. 17), federal officials "promised" petitioners' predecessors that prescription would not apply to the outstanding mineral servitudes if the land were purchased by the United States. Because the United States contracted not with Good Pine, but with Bodcaw Lumber and Grant Timber after those parties had conveyed all of their mineral rights, no such promise could affect the choice of law governing the servitudes on the acquired property.

Furthermore, any such promise would run contrary to the terms of the conveyances. The private mineral servitudes were unquestionably subject to prescription, and the mineral deeds contained terms acknowledging that rule. Pet. App. 18a-19a. In several of the land deeds conveying the parcels to the United States, the parties expressly referred to the mineral deeds and provided that the land sale "*shall in nowise extend or en-*

*large * * * in point of time*" the prior mineral rights. *Id.* at 20a. Bodcaw then sought to reserve unto itself "all of the oil, gas and other minerals * * * for a period of ten years after the expiration of the rights of the said Good Pine Oil Company * * * under the laws of the State of Louisiana," and subject to various contractual terms of prescription.[2] *Ibid.* Finally, the land deeds provided that if Bodcaw's rights prescribed under such terms, the United States would become "vested" in a "complete fee in the land." *Ibid.* In other words, the relevant instruments demonstrate that the United States and Bodcaw specifically intended prescription to apply to the outstanding mineral interests, specifically bargained over the reversionary interest, and specifically made the reversionary interest itself subject to prescription. Application of Act 315 would clearly be hostile to the United States' interests in those circumstances, because it would deprive the United States of the benefit of its bargain.

2. Petitioners are also mistaken in their assertion (Pet. 22-28) that the court of appeals departed from the precedent of this Court or other circuits in its rulings on res judicata and collateral estoppel. Those arguments repeat the contentions in the petition for a writ of certiorari to review the court of appeals' prior decision in this

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[2] The Louisiana Supreme Court subsequently held that reversionary interests in minerals (upon prescription) cannot be owned or conveyed as an article of commerce under Louisiana law. See *McDonald* v. *Richard*, 13 So. 2d 712 (La. 1943); see also Pet. App. 21a n.16. This holding says nothing about the parties' intent here, or about the validity of the relevant contractual terms as a matter of federal common law. See *Central Pines*, 274 F.3d at 891-892.

case, which this Court denied.[3] They continue to lack merit.

a. Petitioners do not contest the res judicata standard applied by the court of appeals. Rather, petitioners simply contend (Pet. 23) that the court *misapplied* that standard to the circumstances of this case, and that the court should have held that the United States was required to litigate the prescription of all the servitudes on the parcels at one time, in *Nebo Oil*. But while all 13 parcels conveyed in the 24,943.93- acre land deed were burdened by Good Pine servitudes, not all of those servitudes were created in the 37,532.13-acre mineral deed cited by petitioners (Pet. 22) and addressed in *Nebo Oil*. See Gov't C.A. R.E. No. 7, at 4-8 (describing creation and use of servitudes 1 through 13).[4] Further, at the time the government filed suit in *Nebo Oil*, the largest of the Good Pine servitudes (covering over 157,000 of the approximately 180,000 acres conveyed in the 11 land transactions) were still in use and had not prescribed. See Gov't C.A. R.E. No. 8, at 1-2. The *Nebo Oil* litigation was prompted by a particular threat to drill on a single 800-acre parcel; the United States had no comparable cause to bring a quiet title action against servitude owners whose servitudes remained in use or were still within the prescriptive period.

In suggesting that the United States nevertheless "could have" litigated title to all or some of the servi-

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[3] The prior petition came in an interlocutory posture, see 04-190 Br. in Opp. 28-29, but the only subsequent development—petitioners successfully defeated prescription on more than half of the disputed acreage, see Pet. App. 4a—certainly does not make this case *more* certworthy.

[4] References in citations to "Gov't C.A. R.E." are to record excerpts filed in the first Fifth Circuit appeal, Nos. 02-30760 & 02-30786.

tudes (Pet. 23), petitioners confuse res judicata with permissive joinder. As the court of appeals here recognized, res judicata applies to all grounds or defenses available to the parties with respect to the specific claim, or nucleus of operative facts, at issue in the first judgment. Other disputes between the same parties that are *not* related to the same operative facts are not barred and may be litigated subsequently. See Pet. App. 34a & n.52 (citing *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979)). Res judicata does not compel a litigant to bring all "claims" (as factual groupings) that could permissibly have been joined in common litigation. See *Rosemann* v. *Roto-Die, Inc.*, 276 F.3d 393, 398 (8th Cir. 2002); *Dore* v. *Kleppe*, 522 F.2d 1369, 1374-1375 (5th Cir. 1975).

b. The court of appeals' collateral estoppel ruling rested on two grounds: first, that the choice-of-law issue was not actually litigated in *Nebo Oil*; second, that even if the issue were actually litigated, the determination would not be preclusive because of a change in the law. Petitioners do not address the former holding at all, which is sufficient reason to reject petitioners' challenge to the alternative holding.

Even if it were properly presented, petitioners' challenge would not warrant further review. The court of appeals' decision that a change in the law justifies setting aside collateral estoppel is not contrary to *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165 (1984). In *Stauffer*, "there had been no change in controlling legal principles between the first and the second action." Pet. App. 42a n.73; see *Stauffer Chem. Co.*, 464 U.S. at 170 (noting that "[t]he Government does not argue * * * that controlling law or facts have changed"). Rather, the Court's decision turned on two distinct and unrelated exceptions to collateral estoppel. See *id.* at 170-

174; accord *Beverly Health & Rehab. Servs.* v. *NLRB*, 317 F.3d 316, 323 n.2 (D.C. Cir. 2003) (applying one of these distinct exceptions). Likewise, in *Burlington Northern Railroad Co.* v. *Hyundai Merchant Marine Co.*, 63 F.3d 1227 (3d Cir. 1995), there had been no "intervening change in the applicable legal context." *Id.* at 1238; accord *Steen* v. *John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 914 (9th Cir. 1997) (same); *North Ga. Elec. Membership Corp.* v. *City of Calhoun*, 989 F.2d 429, 434 (11th Cir. 1993) (same); *Disabled Am. Veterans* v. *Commissioner*, 942 F.2d 309, 314 (6th Cir. 1991) (same).

Nor does the court of appeals' decision conflict with *O'Leary* v. *Liberty Mutual Insurance Co.*, 923 F.2d 1062 (3d Cir. 1991). In that case, the Third Circuit held that the exception for changes in law did "not permit a party to relitigate an issue * * * arising out of the same transaction or set of operative facts—e.g., the same automobile accident—that formed the basis of the first action." *Id.* at 1069. That statement simply acknowledged that the change-of-law exception to the doctrine of collateral estoppel (issue preclusion) cannot be used as a basis for re-litigating matters that would be barred by res judicata (claim preclusion).[5] See *Federated Dep't Stores* v. *Moitie*, 452 U.S. 394, 398 (1981) (stating that "the res judicata consequences of a final, unappealed judgment" are not "altered by the fact that the judgment * * * rested on a legal principle subsequently overruled in another case"). The *O'Leary* court expressly noted a party's right to re-litigate a legal issue, based on "an intervening change in the applicable law, * * * *in an action arising out of a new incident*." 923

[5] *Precision Air Parts, Inc.* v. *Avco Corp.*, 736 F.2d 1499 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985), similarly involved res judicata, not collateral estoppel. See *id.* at 1503.

F.2d at 1069. That is precisely the rule the court of appeals applied here.

3. Petitioners also fail to justify further review in this case based on an alleged conflict over the "panel rule" (the rule that one panel may not overrule law established by another). While acknowledging that the court of appeals "discussed the law of the case doctrine and its exceptions" when declining to disturb the original panel's rulings in the present case, petitioners assert that the court of appeals "apparent[ly]" relied instead on the "panel rule." Pet. 28. Petitioners' premise is simply wrong: the panel rule was not the basis for the decision below.

Petitioners criticize the panel rule because it admits of fewer exceptions than the law-of-the-case doctrine. See Pet. 30. The court of appeals has stated that it may depart from the law-of-the-case doctrine to avoid "a manifest injustice." *E.g.*, *Fuhrman* v. *Dretke*, 442 F.3d 893, 896-897 (5th Cir. 2006) (quoting *United States* v. *Becerra*, 155 F.3d 740, 753 (5th Cir. 1998)). According to petitioners, the panel rule has no such exception.

The distinction does not matter in this case, however, because the court of appeals plainly applied the more permissive law-of-the-case doctrine, but determined that petitioners did not qualify for any exception. Petitioners' extended discussion about *other* cases in which the panel rule purportedly "supplant[s]" the law-of-the-case doctrine, Pet. 30-33, is simply irrelevant. Indeed, petitioners have not identified any difference between the Fifth and Ninth Circuits' approaches that would affect the outcome of this case. Instead, petitioners merely assert that neither the panel rule nor the law-of-the-case

doctrine should apply,[6] or that the court of appeals erred by holding that the facts of this case do not meet the "manifest injustice" standard. Those fact-bound contentions merit no further review and are incorrect in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2008

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[6] Petitioners assert (Pet. 33) that the Fifth Circuit treated as law of the case a pronouncement that was actually dictum. The second Fifth Circuit panel—including Judge Dennis, author of the prior decision—properly concluded that its "deliberate, considered statement" about the inapplicability of Act 315 was holding, not dictum. Pet. App. 5a. This Court does not grant certiorari to review a court of appeals' interpretation or characterization of its own prior opinions.

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No. 07-563

FILED

FEB 8 - 2008

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SUPREME COURT

IN THE

Supreme Court of the United States

PETRO-HUNT, L.L.C., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petro-Hunt, L.L.C. is a Delaware limited liability company and is wholly owned by the William Herbert Hunt Trust Estate, a Texas Trust. Neither Petro-Hunt, nor the parent trust, are publicly traded entities. Both are privately held.

Hunt Petroleum Corporation is incorporated in Delaware. It is a privately held company. Hunt Petroleum Corporation stock is not publicly traded.

Kingfisher Resources, Inc. is incorporated in Delaware. It is a privately held company. Kingfisher Resources, Inc. stock is not publicly traded.

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Petitioners, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc. (hereinafter "Plaintiffs" or "Petitioners"), reply to the Brief of the United States in Opposition as follows.

The government's first "question" presented in its brief ignores the issues raised by the plaintiffs in their petition for *certiorari*. The second question presented by the government misses the point; that is, a number of Fifth Circuit cases have held no law of the case doctrine exists in the Fifth Circuit. *Harris v. Sentry Title Co.*, 806 F.2d 1278, 1282 (5th Cir. 1987); *see also United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984).

I. The District Court's finding of fact that all the acreage is similarly situated to the *Nebo* 800 acres should not have been disturbed by the Fifth Circuit.

The government's protestations that the District Court's undisputed facts are "irrelevant" fail to disprove that which is clear from even a cursory review of the record below. The District Court found as undisputed material fact that the property at issue here was all "similarly situated." *Petro-Hunt, LLC v. United States*, 179 F. Supp. 2d 669, 681 (W.D. La. 2001). This finding of fact was relevant to whether *res judicata* applied. The Fifth Circuit rejected that finding of fact, and *sua sponte* found that all the property was "separate" and "distinct." *Petro-Hunt, LLC v. United* States, 365 F.3d 385, 386-397 (5th Cir. 2004) (*Petro-Hunt I)* This, too, is a finding of fact, but one which contradicts the undisputed facts found by the District Court, that all of the acreage that

was conveyed, along with the 800 acres from *United States v. Nebo Oil Co.*, 90 F. Supp. 73 (W.D. La. 1950), *aff'd*, 190 F.2d 1003 (5th Cir. 1951), in the same deed, was part of the same *transaction. Petro-Hunt, supra*, 179 F. Supp. 2d at 682. The District Court's undisputed findings of fact are presumptively correct. *See, e.g., Matter of Multiponics*, 622 F.2d 709 (5th Cir. 1980). That the Fifth Circuit engaged in fact finding is also apparent because its decision is dependant upon its finding that the property was "separate" and "distinct." It could not have reached the result it apparently sought without rejecting the District Court's findings.

The Fifth Circuit, in *Petro-Hunt I*, 365 F.3d 385 (5th Cir. 2004), reversed summary judgment, and, *sua sponte*, rendered judgment for the United States. Plaintiffs were, by this action, denied a hearing or a trial, or even a meaningful opportunity for argument. *See, e.g., Fountain v. Filson*, 336 U.S. 681 (1949); *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963). *See also Pullman-Standard v. Swint*, 456 U.S. 273, 291-292 (1982). The government makes the anomalous statement that "Petitioners never sought an opportunity to develop the record further. . . ." Opposition p. 13. Plaintiffs asked the District Court for a trial, the purpose of which was to "develop the record" and to resolve the facts.

The government mischaracterizes the *Nebo* 800 acres as one of the 96 mineral servitudes. Opposition p. 7. This 800 acres is not one of the servitudes, but only a part of one. The notion of 96 servitudes is not pertinent to the issues of *res judicata* or collateral estoppel, but only the issue of prescription for nonuse. In order for a servitude to be maintained by drilling or production, it

must be "contiguous." If the land is either not contiguous in fact, or if it is divided by roads, streams, rivers, etc., it is not "contiguous." Drilling or production is required on each of the servitudes in order to maintain the servitude. For example, if a 100 acre tract is divided by a river, then a well must be drilled on each side of the river to interrupt prescription as to the entire 100 acres. The Fifth Circuit's opinion incorrectly likens the 96 servitudes to 96 transactions. The government confused the Fifth Circuit and continues to try to lead this Court through a "Serbonian Bog" [1] of irrelevant Louisiana law in an attempt to confuse the Court as to the real issues. These mineral servitudes were not conveyed separately, but were created by the six identical deeds. The size of each servitude is not discernable from the deeds themselves, but must be divined by a Louisiana title lawyer, armed with information extrinsic to the deeds. The government ignores this fact and claims that "[b]ecause the rights to each servitude turned on distinct operative facts, *res judicata* did not bar claims concerning the 95 other servitudes." Opposition p. 8. However, the government does not say what these "operative facts" are or why they are important.

The Fifth Circuit's decision in *Petro-Hunt I*, 365 F.3d 385 (5th Cir. 2004) regarding *res judicata* and collateral estoppel is clearly erroneous. Even the government admits that "the United States acquired some of the other parcels in the . . . 'same transaction' as the 800 acre parcel in *Nebo Oil*." (Opposition p. 12.) *See, e.g., Nilsen v. City of Moss Point*, 701 F.2d 556 (1993); Restatement (2d) Judgments § 24 (2007).

1: *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1205 (5th Cir. 1988).

Prior precedent of this Court holds that when the remainder of similarly situated property is sought to be litigated, the result of the first case should control the second case if the parties are the same. *See, e.g., Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983); *Arizona v. California*, 460 U.S. 605, 620 (1983); *S. Pac. R.R. Co. v. United States*, 168 U.S. 1 (1897).

Further, *res judicata* applies, not only to matters actually litigated, but also as to all matters which could have been litigated. *Brown v. Felsen*, 442 U.S. 127 (1979); *Richards v. Jefferson County*, 517 U.S. 793 (1996); *Heiser v. Woodruff*, 327 U.S. 726 (1946); *Grubb v. Public Utils. Comm'n*, 281 U.S. 470 (1930). The government provides no meaningful explanation as to why title to all the minerals was not litigated at once, but obviously it could have been. As explained in Plaintiffs' original Petition for *Certiorari*, the *Nebo* 800 acres was part of a 24,943.93 acre conveyance of the surface to the United States and part of a 37,532.13 acre conveyance of minerals to Good Pine. (*See* Petro-Hunt Pet. for *Cert.* pp. 22-23.) There is no logical reason to treat the 800 acres differently from the remainder of these conveyances.

II. The Government's promises to induce the sale found in *Nebo* are relevant.

The government argues (Opposition pp. 15-16) that the promises it made to induce the sale of the surface of the property to it are irrelevant. This is not true. Grant and Bodcaw conveyed the minerals to Good Pine Oil Company, which they (and several other companies) owned. The sale of the surface to the government would not have been made without the government's promises

that the minerals would not prescribe. This finding of fact was made by the *Nebo* Court. 90 F. Supp. at 89, 190 F.2d at 1005. If Grant and Bodcaw had kept the surface, the minerals would have prescribed to them. Because the government promised Bodcaw and Grant that the minerals would not prescribe, Grant and Bodcaw conveyed the surface to the United States, leaving Good Pine, they thought, as owner of the minerals for so long as the government held the surface.

The specific findings in *Nebo* belie the government's claim that "the United States and Bodcaw specifically intended prescription to apply to the outstanding mineral interests, specifically bargained over the reversionary interest and specifically made the reversionary interest itself subject to prescription." Opposition p. 16. The *Nebo* Court found that:

> The undisputed evidence in this case also establishes that at the time the United States purchased the land involved in this litigation, they did not expect or intend to acquire the mineral rights under the tracts purchased. Witnesses for the plaintiff testified that at the time the sale was made Bodcaw's officers had been advised by representatives of the United States that the prescriptive provisions of the Louisiana Civil Code did not apply to lands sold to the federal government.

90 F. Supp. at 89. The *Nebo* court found that "[b]oth Bodcaw and Grant were very interested in the preservation of Good Pines mineral rights. . . ." 90 F. Supp. at 79. Further, "[t]he value fixed to the lands

to be sold to the United States [by Bodcaw] did not include the minerals . . ." *Id.* These specific findings clearly defeat the government's claims.

III. The change in law exception to collateral estoppel does not apply where the parties are the same and the transactions are the same.

The change in the law exception to collateral estoppel, adopted by the Fifth Circuit, is contrary to the law expressed by this court in *S. Pac. R.R.*, *supra* and *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984). This position cannot be reconciled with this Court's statements in *Stauffer*, 464 U.S. 165, 171 (1984), and Restatement (2d) of Judgments, § 28, Cmt. (b) (1982).

The Fifth Circuit adopted in *Petro-Hunt I* the same rule that the Third Circuit rejected in *O'Leary v. Liberty Mut. Ins. Co.*, 923 F.2d 1062, 1067 (3rd Cir. 1991), and that several other circuits have rejected as well. *See, e.g., Steen v. John Hancock Mut. Ins. Co.*, 106 F.3d 904 (9th Cir. 1997); *Beverly Health & Rehab. Servs. v. NLRB*, 317 F.3d 316, 323 n.2 (D.C. Cir. 2003); *N. Ga. Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429, 435 (11th Cir. 1993); *Disabled Am. Vets. v. Commissioner*, 942 F.2d 309, 316 (6th Cir. 1991). *O'Leary* involved the same auto accident. This case involves the same transactions or deeds. *O'Leary* holds that if the transaction is the same and the parties are the same or privies, then the "change in the law" exception does not apply. 923 F.2d at 1069, 1070. *See also Stauffer, supra.*

The government erroneously claims that choice of law issues were not litigated in *Nebo*. The *Nebo* District Court made a determination as to which law, state or federal, should apply. The District Court, after discussion of the interplay of exclusive and concurrent jurisdiction, held:

> Where the United States has not acquired exclusive jurisdiction, or, stated conversely, where the United States and a state have concurrent jurisdiction, the Supreme Court has repeatedly upheld [application of] state legislation which does not interfere with the purposes for which the land was acquired by the United States.

Nebo Oil, 90 F. Supp. 73, 85 (W.D. La. 1950).

Having established that concurrent jurisdiction applied, the court found:

> Where the jurisdiction of the United States is *concurrent* with the jurisdiction of the state, however, as is the case where lands have been acquired under the Weeks Law, it is uniformly held that state statutes enacted after the land is acquired are applicable unless they interfere with the purpose for which the land was acquired by the United States. (Emphasis in original.)

90 F. Supp. at 88.

The issue of which law was to be applied was essential to the court's determination in *Nebo*. Regardless of the manner in which the government originally presented its choice-of-law argument, the District Court did make the choice-of-law analysis that the government maintains was never addressed. In its brief before the District Court in *Nebo Oil*, the government quoted from *United States v. Allegheny County*, 322 U.S. 174, 183 (1944), as follows:

> The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United Sates is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) . . . [other citations omitted].

Brief of the United States before the District Court in *Nebo Oil*, p. 10, filed February 24, 1950. Thus the government not only raised a choice-of-law issue in *Nebo*, but cited *Clearfield Trust* in furtherance of its position.

Stripping away the nomenclature given to issues in the cases, and examining what was actually decided by the *Nebo* court, and comparing that with what was actually decided by the Supreme Court in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), it

becomes quite evident that the two courts made the same analysis about the same issue. In *Nebo*, the court noted that the Weeks Act authorized the purchase of the property for the purposes of the National Forest, but specifically found, based on findings of the National Forest Reservation Commission, "that the Commission had repeatedly stated that the acquisition of lands subject to outstanding mineral rights did not interfere with the use of the lands for national forest purposes." The court further stated:

> In the present case, therefore, since the lands were acquired subject to the prior sale of oil, gas and sulfur to Good Pine Oil Company, the Commission and Secretary of Agriculture must necessarily have found that the ownership of the minerals by Good Pine Oil Company would not interfere with the use of the land for the purpose for which it was acquired.

90 F. Supp. at 86.

The *Nebo* court engaged in a factual analysis finding that application of state law, that is, Act 315 of 1940, was not inimical to the government's interests or purposes because it specifically found the government had not paid for the minerals, did not intend to acquire the minerals, and did not need the minerals for the purposes of the Weeks Act. *Nebo*, 90 F. Supp. at 90.

By comparison, this Court in *Little Lake* found that the application of Act 315 was adverse to a federal statutory scheme, the Migratory Bird Conservation Act, and that the application of the statute would be "hostile

to the interests of the United States." 412 U.S. at 597. The court found that application of Act 315 would deprive the government "of bargained for contractual interests." 412 U.S. at 600. Without attaching a label to the analysis conducted by either the *Nebo* court or the Supreme Court, when comparing the two analyses, it seems apparent that the two analyses are the same. An audible recitation of the *Nebo* finding tends to prove that this is so. If the Weeks Act did not require purchase of the minerals to fulfill its purpose, and the government did not intend to buy the minerals nor pay for the minerals, and had represented that it was not buying the minerals, then it seems obvious that Act 315 was not hostile to the interest of the government, nor did it deprive the government of any bargained for contractual interest. That the two courts reached different results does not mean the issue was not actually litigated in *Nebo*.[2]

According to *Petro-Hunt I*, the Fifth Circuit in *Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001), found *Nebo* did not decide the choice-of-law issue that the government now makes much ado about. However, the issue in *Central Pines* pertained to whether *Little Lake* overruled *Nebo*, and was not an analysis of what issues had been decided in *Nebo* for the application of collateral estoppel. Thus, for the purpose of deciding matters actually litigated for the purposes of collateral estoppel, the off-hand findings by the *Central Pines* court should be regarded as *dicta*, not to be relied on by the *Petro-Hunt I* panel for a collateral estoppel determination. Neither *Central Pines* nor the *Petro-Hunt I* panel conducted a thorough analysis as to what issues were actually litigated in *Nebo*.

2. As plaintiffs previously noted, this Court distinguished *Nebo* on its facts in *Little Lake*, 412 U.S. at 586 n.4.

IV. The Fifth Circuit's rigid application of the panel rule, in the same case, deprives the plaintiffs of due process, or alternatively, this Court should exercise its supervisory power to achieve uniformity in the circuits.

The issue is not, as the government avers, whether the Fifth Circuit correctly applied the "law of the case doctrine." *See* Opposition (I). "[T]he law of the case doctrine is supplanted by our firm rule that one panel cannot disregard the precedent set by another panel even though it perceives error in the precedent." *Harris v. Sentry Title Co.*, 806 F.2d 1278, 1282 (5th Cir. 1987); *see also United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984). Simply put, a number of Fifth Circuit cases such as *Harris*, say the Fifth Circuit has no law of the case doctrine. This is not in accord with other circuits. *See, e.g., Tahoe-Sierra Pres. Council v. Tahoe Reg'l. Planning Agency*, 216 F.3d 764, 786 (9th Cir. 2000); *Mendenhall v. NTSB*, 213 F.3d 464, 469 n.3 (9th Cir. 2000).

"The law of the case doctrine presumes a hearing on the merits." *United States v. Hatter*, 532 U.S. 557, 566 (2001). The Fifth Circuit's holding in *Petro-Hunt I* did not involve a hearing on the merits. The fact finding by the District Court was limited to whether *res judicata* and collateral estoppel applied. Anything else discussed by the Fifth Circuit is necessarily *dicta*. If *res judicata* does only pertain to the 800 acres, then plaintiffs have not had an opportunity to be heard as to the rest of the 180,000 acres on the issue of whether, under the facts of this case, Act 315 is hostile to the interests of the United States as found on substantially different facts in *United States v. Little Lake Misere Land* Co., 412 U.S. 580 (1973).

CONCLUSION

This Court should grant Plaintiffs' Petition for *Certiorari*. The decision of the District Court was correct and should be reinstated, or alternatively, the decisions of the Fifth Circuit should be vacated and this case remanded for trial.

Respectfully submitted,

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